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No.

In The

Supreme Court of the United States

October Term, 1986

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW:

1. Has the Seventh Circuit violated Petitioner's First Amendment rights to petition the government for a redress of grievances and to free speech, by imposing a substantial penalty against him where, in good faith, he presented to that court an appeal raising issues of judicial impropriety?

2. Should the Court extend its decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.* (393 U.S. 145 [1968]) and require that at the outset of any federal court case, the judge, counsel, and all parties be required to disclose any circumstances which reasonably could require the disqualification of the judge?

3. Should the "possible temptation" prohibition which the Court has identified in a line of cases as requiring *per se* judicial disqualification to comply with the Due Process

Clause of the Fourteenth Amendment, apply where the presiding judge/his office, prior to his ascension to the bench, **"maintained communication"** with Respondents' attorneys concerning this **same** case to which he then was assigned upon becoming a judge?[1]

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[1] See, e.g., *Marshall v. Jerrico, Inc.*, 46 U.S. 238, 242-243 (1980); and most recently, *Aetna Life Insurance Co. v. Lavoie*, ___ U.S. ___, 89 L.Ed. 2d 823, 833, 835 (1986).

Subsidiary Questions Involving Related Issues: Should the Court deem the questions above as worthy of granting a Writ of Certiorari, Petitioner suggests several related subsidiary questions:

4. Did the above-described extrajudicial "maintained communication" relationship between the presiding judge/his former office and Respondents' attorneys also deny Petitioner his Constitutional right to an impartial judge by violating the *per se* "of counsel" prohibition of the pre-1974 version of 28 U.S.C. § 455 (which has been held applicable to this case)? And,

5. (With respect to adjudication of the present R. 60 [b] [6] motion) Was Petitioner denied his right to an impartial judge where the District Court based its refusal of his recusal request, not on consideration of the reasons set forth in the request, but on its assessment of the merits of the R. 60 (b) (6) motion?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Both opinions below are attached hereto in Appendix A. The January 17, 1985, decision and order of the District Court for the Eastern District of Wisconsin are unreported. The August 20, 1986, opinion of the United States Court of Appeals for the Seventh Circuit is reported at 798 F.2d 1069.

JURISDICTION

Petitioner timely filed a petition for rehearing with the Court of Appeals (on September 24, 1986, pursuant to an extension granted by that Court on September 3, 1986), which was denied on November 17, 1986.

Petitioner was granted an extension of time to and including March 17, 1987, in which

to file a Petition for a Writ of Certiorari (by an order signed by Justice Stevens on February 9, 1987).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

-the 1st Amendment to the United States Constitution;
-the 14th Amendment to the United States Constitution.
-28 U.S.C. § 144;
-28 U.S.C. § 455 (prior to 1974 amendment); and
-Fed.R.Civ.P. 60 (b);

These provisions are attached hereto in Appendix B.

STATEMENT OF THE CASE

THE FACTUAL BACKGROUND

This is one of two diversity defamation actions filed by Petitioner between the time he was convicted of several offenses arising out of a 1960 tax case, and when he received a Presidential Pardon for those offenses in 1972. In the interim, he became the subject of increasing attention in the (midwest) regional

and national press and in Congress concerning whether he was being treated unjustly.[2]

One aspect of the public controversy was whether Wisconsin medical board officials and particularly their counsel, an assistant to then-Wisconsin Attorney General Robert W. Warren, were violating the Civil Rights of Petitioner, a physician, by interfering with his obtaining licensure and practicing in other states (e.g., Illinois) by disseminating false information (e.g., that he had performed illegal abortions). (present R. 60 [b] [6] motion, par. #8)

In the face of mounting press and Congressional criticism, Warren in his supervisory position as Attorney General (1969-1974) repeatedly became personally involved and was kept informed regarding the matters in

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[2]E.g., 115 *Congressional Record* No. 26, H877 (February 7, 1969); 118 *Congressional Record* No. 47, E3117 (March 27, 1972); 119 *Congressional Record* No. 23, E757 (February 8, 1973); 119 *Congressional Record* No. 26, E902 (February 20, 1973)

which his office was opposing Petitioner.[3] In 1970, Petitioner filed the first defamation (and Civil Rights) lawsuit against Warren's assistant and medical board officials. Warren was defense counsel of record in the case until he became a Federal District Judge in 1974.

Shortly after the first defamation action had been filed, Alida Johns, then a reporter for the *Milwaukee Sentinel,* allegedly initiated a series of defamatory telephone calls to public officials about Petitioner--from which this second defamation lawsuit arose (and was filed in 1972). According to various witnesses,

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[3]E.g., Warren ***met*** with his assistants ***to be personally aware of "all aspects" of the Margoles matters and to discuss strategy about them*** (Pl. Exh. #23, 40), approved and signed correspondence about Petitioner (e.g., Pl. Exh. #21), and ***was sent a flow of memoranda and materials about Petitioner*** in accordance with his assistant's promise ***to keep Warren informed of "any further developments."*** (E.g., Pl. Exh. #20, 22-24, 31, 40) These occurred with Warren's efforts to head off an investigation by the Civil Rights Division of the U.S. Justice Dept. (1969-1970) and in Warren's role as counsel in state court, opposing medical license reinstatement for Petitioner (1969-1970; R. 60 [b] [6] motion, par. #9-10).

Respondent Johns--upon learning that the Illinois medical board had approved Petitioner's application--contacted them and sought to have that decision reversed and support on his behalf for a Presidential Pardon withdrawn. Among other slurs, she, too, allegedly accused Petitioner of having performed illegal abortions. (R. 60 [b] [6] motion, par. #11; e.g., Pl. Exh. #1, 3-8)

Because, to all appearances to Petitioner, this was but a continuation where the smear campaign emanating from Atty. Gen. Warren's office had left off, Petitioner repeatedly attempted to establish a connection between them through pre-trial discovery in both slander lawsuits. However, any such substantive communications were denied by the defendants in both cases. (R. 60 [b] [6] motion, paragraph #12)

THE PROCEEDINGS IN THE COURTS BELOW

Original Proceedings: In 1974, Petitioner moved for the Hon. John W. Reynolds to disqualify himself from this case because as a former Wisconsin Attorney General he had counselled action against Petitioner's medical license after the 1960 tax conviction. While that motion was pending, Atty. Gen. Warren was nominated to the federal bench, and within the course of a two-week period in October, 1974, Warren was transformed from opposing counsel in Petitioner's first defamation case (in the Western District of Wisconsin) to presiding judge in this, Petitioner's second defamation case--which was reassigned to Warren upon donning his judicial robe in the Eastern District of Wisconsin.

Because the explicit provisions of 28 U.S.C. § 144 and uniform case law construction at that time of § 144 barred Petitioner from moving for the disqualification of a second judge in the same case, at Judge Warren's first

appearance in this case on April 25, 1975, Petitioner expressed his concern to Judge Warren about Warren's partiality because of his previous adversarial positions as Attorney General against Petitioner.

Judge Warren summarily disclaimed any bias and did not disqualify himself. Petitioner did not appeal the issue, because at that time the Seventh Circuit did not allow writs of mandamus or prohibition for judicial disqualification (see *SCA Services, Inc. v. Morgan,* 447 F.2d 110, 117, 7th Cir. [1977]), or for the issue (formally) to be raised for the first time on appeal.(*Barry v. U.S.*, 528 F.2d 1094, 1100, 7th Cir. [1976])

On Jan. 8, 1976, six weeks after Petitioner fully (although two months tardily because of serious illness and extraordinary personal difficulties) had complied with a discovery order, Judge Warren nonetheless granted Respondents' motion to dismiss this case upon finding that Petitioner wilfully had

disobeyed his order. This became the first reported federal case to allow dismissal under Fed.R.Civ.P. 37 (B) (2) (C) notwithstanding full prior compliance, in the absence of any prior warning of possible sanctions by the court, and where the delay was due to personal illness and hardship rather than refusal to comply. Judge Warren denied Petitioner's R. 60 (b) motion to reconsider. On the basis of the record presented to it, the Seventh Circuit affirmed Judge Warren in what it found to be a close case in which it was not allowed to substitute its discretion for Judge Warren's. (*Margoles v. Johns*, 587 F.2d 885, 888-889, 7th Cir. [1978]; cert. denied, 420 U.S. 946 [1977])

Second Set of Proceedings: In 1979, as the first defamation case was about to go to trial, the Attorney General's office produced some additional documents which established that -- contrary to its previous representations--in fact, there had been substantive communications regarding Petitioner

between that office and the Respondent newspaper company, and that a secret investigative file (designated "DCI 22-7") on Petitioner existed in the office. However, the Attorney General's office successfully barred Petitioner from seeing the rest of those files. (R. 60 [b] [6] motion, par. #18-19)

Consequently, in 1980 Petitioner brought a second, R. 60 (b) (4) motion, seeking to have Judge Warren's judgment of dismissal declared void because of the ***appearance of partiality*** (under Canon 3 [C] of the Code of Judicial Conduct) resulting from Warren's previous roles as Attorney General opposing Petitioner in the ***other litigation***. Petitioner requested an evidentiary hearing so that all of the facts and ramifications could be learned about the emerging evidence of apparent communications regarding Petitioner between Warren's office as Attorney General and the Respondent newspaper company, and about the extent of Judge Warren's knowledge and involvement in those matters.

Respondents' counsel vigorously opposed the granting of the hearing as well as the motion. The Hon. Terence T. Evans, to whom the motion was assigned, denied both the hearing and the motion in a decision which avoided any mention of the specific documents and threshold facts Petitioner had submitted as to Atty. Gen. Warren's extensive personal contacts with the cases in his office relating to Petitioner. The Seventh Circuit adopted Judge Evans' decision as its own, including the first reported holding by any federal court that "a litigant is not denied due process by... 'the appearance' of partiality..." (*Margoles v. Johns,* 660 F.2d 291, 296, 7th Cir. [1981]; cert. denied 455 U.S. 909 1982])

Present Proceedings: Most recently, Petitioner attempted in 1983 under Wisconsin's newly enacted Open Records Law (Chapter 335, Laws of 1981) to see the files on him in the Attorney General's office to which he still was being denied access. Pursuant to this request,

that office for the first time made available to him ***parts*** of files on him, of whose contents he had no prior knowledge. These included:

1. Memoranda and correspondence revealing that for ***several years*** while Warren was Attorney General immediately prior to becoming the judge in this case-- **Warren's office had "MAINTAINED COMMUNICATION" WITH RESPONDENTS' ATTORNEYS CONCERNING THIS CASE both to enable Warren's office to better defend itself against Petitioner in the other defamation case and to assist Respondents' attorneys in this very case from which Warren thereafter would not recuse himself**; (Pl. Exh. #B-1)

2. Portions of the "DCI 22-7" file, including transcripts of recorded telephone conversations, disclosing that by the time Warren became Attorney General, his office already had used another, veteran reporter for the Respondent newspaper company to investigate Petitioner to obtain information for use against him in other proceedings. (Pl. Exh. #B-8-9) While the reporter at that time (1965) was not on the newspaper company's payroll, subsequently the Attorney General's office again sought the reporter's assistance for information for use against Petitioner--and this occurred after the election in 1968 of Warren as Attorney General and when the reporter again was an employee of that company. Thus, the newly produced "DCI 22-7" transcripts raised the issue whether Judge Warren had presided over a defamation lawsuit notwithstanding that his previous office had been utilizing the defendant newspaper company to investigate and help discredit plaintiff.

However, the Attorney General's office would not produce the rest of these files bearing on the extent of these activities and

Atty. Gen. Warren's personal involvement and/or knowledge regarding them. (It asserted lawyer-client privilege as to the former; R. 60 [b] [6] motion, par. #22-26)

On the basis of these newly discovered documents, Petitioner in 1984 filed the present R. 60 (b) (6) motion, asking that the proceedings in this case over which Judge Warren presided be nullified because of the ***actual prejudice*** caused to Petitioner and the judicial process by:

1. The repeated failures throughout the two previous sets of proceedings in this case--especially with Petitioner twice having raised the disqualification issue--of Judge Warren/his former office as Attorney General and Respondents/their attorneys to disclose the existence of these extrajudicial relationships; and

2. The *per se* disqualification of Judge Warren from this case because these extrajudicial activities respectively violated the "of counsel" and "substantial interest" prohibitions of pre-1974 28 U.S.C. § 455 (which the Seventh Circuit has held applicable to this case [footnote #2 at A-4], and which it had found not at issue in the 1980 R. 60 [b] [4] motion; *Margoles v. Johns*, 660 F.2d at 299, 7th Cir. [1981]) as well as the "forbidden temptation" disqualification requirement of

this Court.[4]

Once again, Petitioner requested an evidentiary hearing so that all of the relevant facts and ramifications finally could be made known. And, Petitioner asked that this motion be assigned to an outside judge, because this motion accused Judge Warren (and Respondents' lawyer, James P. Brody) of ethical misconduct,

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[4]Because the Wisconsin Attorney General's office would not produce its files bearing on the extent of Atty. Gen. Warren's personal involvement and knowledge regarding the newly disclosed extrajudicial relationships (e.g., Pl. Exh. #B-29, 35, 38-40), Petitioner submitted that the presumption should apply here that "particular individuals in a law firm freely share their client's confidences with one another"--the application of this presumption in a given case "turn[ing] on the possibility, or appearance thereof, that confidential information might have been given to the attorney in relation to the subject matter in which disqualification is sought." (*Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722, 7th Cir. [1982]) That this presumption applies to judicial as well as lawyer disqualification, see *Hampton v. Hanrahan*, 499 F.Supp 640, 645, N.D.Ill.E.D. (1980). Its appropriateness to Judge Warren in this case, Petitioner submitted, is evident from the documented pattern of Atty. Gen. Warren's contacts, involvement, and knowledge regarding the other Margoles cases in his office.

not judicial error; and, further because simultaneously Atty. James P. Brody was counsel of record in the same Court, defending Judge Warren in an unrelated Civil Rights lawsuit. (*Steinle v. Warren*, in which Brody succeeded in winning dismissal for Judge Warren, 765 F.2d 95, 7th Cir. [1985])

And once again, Atty. Brody opposed not only the R. 60 (b) motion, but also Petitioner's receiving an evidentiary hearing.

For one year, the Hon. Terence T. Evans did not act on Petitioner's repeated requests for recusal, his R. 60 (b) (6) motion, his request for a hearing, and would not acknowledge any of his correspondence. Finally, Petitioner filed a petition for a writ of mandamus with the U.S. Court of Appeals for the Seventh Circuit, seeking the assignment of an outside judge. Before that Court acted on the petition, Judge Evans ruled that he would not recuse himself because the R. 60 (b) (6) motion "must so obviously be denied" (A-16),

and denied the motion as insufficient and precluded by *res judicata*. (A-15-16) Thereupon, the Court of Appeals dismissed the petition as moot.

The Seventh Circuit held Petitioner's appeal from Judge Evans' decision to be "frivolous" and assessed him $2,500 in damages, fees, and costs. It denied his petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. THE FIRST AMENDMENT RIGHTS "TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES" AND TO FREE SPEECH INCLUDE GOOD FAITH CRITICISM OF FEDERAL JUDICIAL IMPROPRIETY, AND ARE TO BE EXERCISED WITHOUT RETRIBUTION BY THE COURTS.

Petitioner, after presenting to the lower courts the newly discovered facts and the issues they raise as to the improprieties relating to the Hon. Robert W. Warren not recusing himself from this case, now feels like the little child in Hans Christian Andersen's fable, "The Emperor's New Clothes." The lower courts here, like the crowds, the courtiers,

and the emperor himself in the fable, would not accept the truth coming before their eyes.

The fable does not say whether any harm befell the child for risking the wrath of the emperor by speaking the truth. But in this case, the Seventh Circuit has demonstrated its displeasure. Instead of addressing the compelling issues of violations of judicial ethics and Due Process rights actually raised in Petitioner's appeal, that Court has punished Petitioner for raising these issues.

Petitioner is well aware that some parties and attorneys have brought frivolous appeals regarding judicial ethics, but this was not one of them. Sensitive to the responsibility and professionalism with which such serious matters should be presented, Petitioner set forth in specific detail the extraordinary facts, citations to corroborative exhibits, and a considerable body of case law and other authority supporting his issues and arguments.

In response, the Seventh Circuit ***devoided***

Petitioner's appeal of its significance by variously omitting and fundamentally changing the primary issues, exhibits, and standards of review--so that the decision bears little resemblance to Petitioner's appeal actually briefed and argued to that Court.[5] Thereupon,

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[5]Petitioner has asked the District Court Clerk to include in the certified record available for this Court's review all of the briefs submitted to the Seventh Circuit in the appeal at issue (*Margoles v. Johns*, Case #85-1267). A comparison of the briefs and the Seventh Circuit's decision substantiates, e.g. that:

a. **PL. EXH. #B-1--"MAINTAINED COMMUNICATION"**: Nowhere did the decision mention Petitioner's principal exhibit which prompted the present R. 60 (b) (6) motion (*supra*, p. 11; *infra*, pp. 26-30) Instead, the decision took but ***one example*** of the communications (Pl. Exh. #B-4, a cover letter with copies mostly of legal documents which were mailed to Respondents' counsel) and specifically analyzed only this secondary exhibit, out of context, as if it were the totality of the communications and the principal exhibit did not exist (A-9; see Pl. Br., pp i, 24-31; Pl. R. Br., pp. ii, 14-17);

b. **"ACTUAL" PARTIALITY/PREJUDICE**: The decision misstated the applicable criterion for disqualification: "The plaintiff maintains that the proper threshold of proof would be that of an appearance of partiality." (n.11, A-11) In fact, Petitioner's appeal emphasized that the newly disclosed extrajudicial

it imposed a substantial penalty of $2,500 in damages, fees, and costs, upon Petitioner for

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relationships come within multiple ***per se*** disqualification prohibitions, that the repeated failures to disclose these activities constituted ***actual prejudice*** and that the "appearance of partiality" was *not* involved in the appeal. (See Pl. Br., pp. **22-24**; Pl. R. Br., pp. **4-5**) By applying the wrong standard, the decision *"ipso facto"* precluded Petitioner from prevailing, because that Court previously had held that the "appearance of partiality ...cannot rise to the level of reversible error" (A-11-12); and

c. **NON-DISCLOSURE ISSUE:** The first and a key issue raised in Petitioner's brief was the **actual** prejudice caused by the repeated failures to disclose the newly discovered extrajudicial relationships. Relatedly, Petitioner asked the Seventh Circuit to address the prejudice caused by the continuing refusal of the Attorney General's office to allow him access to the rest of its files relating to these activities. (Pl. Br., pp. i, 3, 10-11, 13-22; Pl. R. Br., ii, 8, 12-14, 19; Pl. Supplemental Br., p. 2) Yet, nowhere did the Seventh Circuit substantively discuss this issue. Regarding Respondents/their attorneys, it said nothing. With respect to Judge Warren/his former office, it only briefly noted that Petitioner had claimed non-disclosure (A-5) and made "unsupported allegations" which, the Seventh Circuit suggested, the District Court "obviously found...inconsequential." (n.9, A-10; in fact, the District Court's decision did not mention the non-disclosure issue. Cf: Petitioner's R. 60 [b] [6] motion, par. #29).

bringing a "frivolous" appeal. (A-12)

The Seventh Circuit's decision brings to this Court significant and troublesome Constitutional questions, because it is both an entirely improper approach to appellate review of good faith allegations of judicial impropriety, and **a gross violation of Petitioner's First Amendment rights of "petition" and free speech to raise such issues.** Certiorari is warranted to vindicate Petitioner's First Amendment rights here, because:

> "The right to petition is 'among the most precious of the liberties guaranteed by the Bill of Rights,' *Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 222 (1967) ...and except in the most extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,' *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)." (*McDonald v. Smith*, ___ U.S. ___, 86 L.Ed. 2d 384, concurring opinion of Justice Brennan at 390 [1985])

To permit the Seventh Circuit's decision to stand would be to deny Petitioner the "substantial 'breathing space'" that the First Amendment requires to be extended to such good

faith expression, and "would intolerably chill 'would-be critics of official conduct ...from voicing their criticism.'" (*Id.* at 390, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 272, 279 [1964])

2. TO PROTECT THE INTEGRITY OF THE JUDICIAL PROCESS AND CONSERVE JUDICIAL RESOURCES, THE COURT'S DISCLOSURE REQUIREMENTS FOR ARBITRATORS (COMMONWEALTH COATINGS CORP. V. CONTINENTAL CASUALTY CO. [393 U.S. 145, 1968]) SHOULD BE EXTENDED TO ALL FEDERAL COURT PROCEEDINGS.

This case is the latest in a recurring problem of "non-disclosure" cases which has arisen in recent years--particularly in the Seventh Circuit. In a variety of settings, disclosures have not been made of potentially disqualifying circumstances or relationships.[6]

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[6]Examples of different "non-disclosure" situations within Seventh Circuit include:

-Two criminal prosecutions which the U.S. Attorney in Chicago personally tried before a U.S. District Judge. In one case, neither the prosecutor nor the judge disclosed that they were such close personal friends that they had planned a vacation together for after the trial--and when the defendant was convicted, his sentencing was advanced so that it would not interfere with their vacation. (*U.S. v.*

The practical problem now evident from such cases is that it is one thing for judicial disqualification standards to be enacted; it is another to assure that they are being followed.

Murphy, 768 F.2d 1518, 7th Cir. [1985]) In the other case, neither disclosed that they had returned from another joint vacation just a few days before that trial began. (*U.S. v. Rovetuso*, 768 F.2d 809, 7th Cir. [1985]; the decision did not specifically mention the "non-disclosure" issue raised in that appeal. The "non-disclosure" controversies in both cases were analyzed in "Hearing Sought on Webb-Kocoras Relationship," by Rob Warden in *Chicago Lawyer*, September, 1985. Both convictions were confirmed.);

-A $10,000,000 arbitration award was set aside in Federal District Court (N.D.Ill.E.D.) after a party discovered that the neutral arbitrator had failed to disclose his previous employment by and under the supervision of the principal stockholder of the other party (reinstated by the Seventh Circuit in *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 7th Cir. [1983]); and

-In a $150,000,000 bankruptcy case, the Federal District Court (N.D.Ill.E.D.) expunged two key orders (which--defendants discovered--secretly had been written for the Chief Bankruptcy Judge by the debtor's law firm), disqualified both the Bankruptcy Judge and the law firm from the case, and imposed substantial monetary sanctions against the law firm. (*In Re Wisconsin Steel Corp.*, 48 B.R. 753, N.D.Ill. E.D. [1985])

This gap demonstrates the need for the adoption by this Court (through the exercise of its supervisory power) of a disqualification disclosure requirement applicable to all federal court proceedings. The espousal by the Court of such a rule--with the deterrence of appropriate sanctions--could reduce this problem and needless additional litigation and wastes of judicial resources generated by ensuing judicial challenges--along with the public taint to the judicial process attendant to some of these controversies.

The basis for this rule already is to be found in *Commonwealth Coatings Corp. v. Continental Casualty Co.* (393 U.S. 145 [1968]), in which the Court set forth disclosure requirements for federal arbitrators. To "establish...an atmosphere of frankness at the outset," the Court set forth **"the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."** (*Id.*, Justice

White's concurring opinion at 306; majority opinion at 305)[7] Although the Court in that case noted the differences between arbitrators and Article III judges, it looked to the Judicial Canons for guidance because the Court has construed the disclosure requirements for both to be based in the same ethical principle and premise. (*Id.*, at 305)

This case demonstrates the genuine need for, and provides the Court with an appropriate vehicle through which to extend its disclosure requirement stated in *Commonwealth Coatings*.

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[7]Petitioner suggests that the proposed disclosure rule include the following components:

1. At the outset of any federal court proceeding, full disclosure must be made by the judge, counsel, and all parties of any circumstances which reasonably could require disqualification of the judge;

2. The obligation is a continuing one; and

3. Failure to timely make such disclosure may constitute actual prejudice to the other party(ies) and the judicial process, and may warrant nullification of proceedings and/or other appropriate sanctions.

Twice before--beginning with Judge Warren's first appearance in this case in 1975--Petitioner raised the disqualification issue. Neither time was Petitioner informed by Judge Warren or Respondents'/their attorneys of the newly disclosed extrajudicial relationships. Now, in the face of these discoveries leading Petitioner for the ***third time*** to raise the disqualification issue and seek full disclosure, the lower courts instead have sanctioned a judge not recusing himself from a case notwithstanding the existence of extrajudicial relationships which may have rendered his participation improper *per se*--and the party challenging the judge's impartiality still is effectively blocked from learning the full details and extent of these relationships and of the judge's involvement in them. As an added indignity, for raising these issues, the party is penalized $2,500 to the Respondents who successfully opposed the hearing sought by the party on these issues.

These circumstances warrant Certiorari, because judicial impartiality is a cornerstone of equal Justice, and disclosure of such Due Process and ethical importance cannot be permitted to become a function of choice or chance, or of a strategy of "one-upmanship." Petitioner asks the Court not to allow to stand the dangerous precedent here of judicial impartiality becoming a function of "catch-as-catch-can." No party should have to run this type of obstacle course so that it might uncover or pry loose pertinent facts determining whether a presiding judge is ineligible to hear its case.

3. THE COURT'S "FORBIDDEN TEMPTATION" DUE PROCESS STANDARD FOR JUDICIAL DISQUALIFICATION AND (PRE-1974) 28 U.S.C. § 455 REQUIRE NULLIFICATION OF THE PROCEEDINGS IN THIS CASE OVER WHICH JUDGE WARREN PRESIDED, BECAUSE WARREN/HIS PREVIOUS OFFICE AS WISCONSIN ATTORNEY GENERAL HAD "MAINTAINED COMMUNICATION" WITH RESPONDENTS' ATTORNEYS CONCERNING THIS SAME CASE IN WHICH WARREN THEREAFTER BECAME JUDGE AND FROM WHICH HE WOULD NOT RECUSE HIMSELF.

This case also warrants Certiorari because it presents to the Court an extraordinary

extrajudicial relationship so inimical to the essence of "Equal Justice Under Law" that it comes within the special category of situations to which the Court has applied its *per se* **"forbidden temptation"** prohibition.

These circumstances, the Court has found, "cannot be defined with precision" (*In Re Murchison*, 349 U.S. 133, 136 [1955]) and must be addressed on a case-by-case basis where,

> "...various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin*, 421 U.S. 35, 47 [1975] Consequently, no actual bias need be present or proved--disqualification and reversal follow a determination that the "situation is one 'which would offer a possible temptation to the average...judge to...lead him not to hold the balance nice, clear and true.'" *Aetna Life Insurance Co. v. Lavoie, op. cit.*, ___ U.S. ___, 89 L. Ed. 2d 823, 833, 835 [1986], citing earlier authority.)

Two key words bring the newly discovered internal memorandum within the **"forbidden temptation"** prohibition--**"MAINTAINED COMMUNICATION."** (Pl. Exh. #B-1; R. 60 [b[[6] motion, par. #23)

"Communicated" or "exchanged information" (A-8-10) may be one-time and without Constitutional implications, but "**maintained**" (which appears *nowhere* in the Seventh Circuit's decision) means that the communications between Warren's office as Attorney General and Respondents' attorneys were ***ongoing***.[8] Indeed, the communications were mentioned in describing an assistant's activities regarding Petitioner ***spanning several years***.

What especially renders these extra-judicial communications so Constitutionally repugnant is that they did not occur in the course of Judge Warren's "neutral" judicial

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[8]The memo speaks of the activities of another of Atty. Gen. Warren's assistants and does not indicate whether Warren was personally involved or kept informed of these communications. However, as noted above, Petitioner is entitled to an affirmative presumption in this regard (1) because that office asserts lawyer-client privilege against producing the rest of its "trial" file bearing on this issue, and (2) because other documents produced by that office establish the pattern that Warren in his supervisory role repeatedly was *personally* involved and being kept informed concerning the other Margoles cases in his office. (See p. 3-4 and n.3, p. 3-4, *supra*.)

capacity--but adversariously against Petitioner. Atty. Gen. Warren/his office and Respondents' attorneys both were preparing their defense in their respective defamation cases against the ***same*** Plaintiff and claims of the ***same*** type of defamation. (*supra*, pp. 3-5; by omitting these specifics from its decision, the Seventh Circuit further obfuscated the Due Process issues actually presented to it.)

The collaboration among attorneys here which was partisan trial preparation--involving no breach of legal ethics--became a manifest violation of Due Process when one of those lawyers became the judge in the very case in which he/his assistant(s) had "maintained communication" with and provided information to assist counsel for one side![9]

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[9]This consultative role also requires nullification of Judge Warren's judgment of dismissal under the "of counsel" prohibition of (pre-1974) 28 U.S.C. § 455, which is "unconditional and absolute." (*U.S. v. Amerine*, 411 F.2d 1130, 1134, 6th Cir. [1969]) A broad body of authority recognizes mandatory "of counsel" disqualification where a judge had been "consulted in preparation for the case."

This extrajudicial relationship of "maintained communication" so flagrantly contravenes the principle of neutrality of the federal courts and the judicial process, as to call for an exercise of the Court's supervisory power. For this type of situation to be

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("Disqualification of Judges and Justices in the Federal Courts," 86 *Harvard Law Review* 736, 760 [1973]; e.g., "Disqualification For Interest of Lower Federal Court Judges: 28 U.S.C. § 455," 71 *Michigan Law Review* 538, 551 [1973]; and 72 *ALR2d* at 462, "Disqualification of Judge," § 7 -- "Consultation as Representation")

That these serious allegations of impropriety against Judge Warren and Atty. Brody arose at the same time that Atty. Brody was defense counsel for Judge Warren in the same court in an unrelated Civil Rights lawsuit, Petitioner submitted, warranted the assignment of an outside judge to this R. 60 (b) (6) motion.(*supra*, p. 14) Judge Evans refused this request because of his opinion that the R. 60 (b) motion "must so obviously be denied." (A-16) Notwithstanding that the Seventh Circuit simply dismissed this issue as being "completely without merit" (n.3, A-5), Judge Evans applied a methodology for assessing disqualification, which is wholly alien to Constitutional requirements for judicial impartiality. Disqualification cannot depend on a judge's assessment of the merits of a proceeding, because a judge who lacks legal capacity to hear a case, by law, is incapable of rendering any such determination. (*U.S. v. I.B.M.*, 618 F.2d 923, 926, 2d Cir. [1980])

sanctioned, as it has been by the lower courts, provides additional fodder for public cynicism that this is the way many courts operate, and that they are a "closed fraternity" beyond reproach.

CONCLUSION

For the reasons stated above, we respectfully submit that this is a case of such importance as to warrant the granting of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Perry Margoles
312 Holdridge Avenue
Winthrop Harbor, Ill. 60096
(312) 746-1971

Attorney for Petitioner

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1267

DR. MILTON MARGOLES,

Plaintiff-Appellant,

v.

ALIDA JOHNS and THE JOURNAL COMPANY, a Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 72 C 470—Terence T. Evans, *Judge.*

ARGUED OCTOBER 23, 1985—DECIDED AUGUST 20, 1986

Before CUDAHY, ESCHBACH, and POSNER, *Circuit Judges.*

PER CURIAM. The plaintiff, Dr. Milton Margoles, brought this slander action in 1972 against The Journal Corporation, and Alida Johns, a reporter for the Journal. The district court dismissed the action in 1976, pursuant to Fed. R. Civ. P. 37(b)(2)(C), because of the plaintiff's failure to comply with discovery orders. The plaintiff unsuccessfully challenged the dismissal on direct appeal and in a subsequent collateral attack pursuant to Fed. R. Civ. P. 60(b)(4). The plaintiff is once again before us, following the district court's denial of his motion to vacate the dismissal and reinstate the action pursuant to Fed. R. Civ. P. 60(b)(6). For the reasons stated below, we will affirm.

I

For many years prior to 1962, the plaintiff was a licensed physician in Wisconsin and a number of other states. In 1960, the plaintiff was convicted of several violations of the Internal Revenue Code and was sentenced to one-year imprisonment and ordered to pay $15,000.00 in fines. Later that same year, he was convicted of attempting to influence an officer of the court and of attempting to obstruct justice, and was sentenced to five-years imprisonment and ordered to pay $5,000.00 in fines. In 1961, the plaintiff was also convicted of communicating with a juror, and was sentenced to six-months imprisonment and fined $1,000.00.

The plaintiff's license to practice medicine and surgery in Wisconsin was revoked on February 26, 1962. Licenses he held to practice medicine in other states were subsequently revoked as well. Upon his release from prison on parole in 1962, the plaintiff commenced a campaign to regain his Wisconsin medical license. However, both in 1965 and 1969, the Wisconsin State Board of Medical Examiners, following formal hearings, denied him relicensure.

On August 18, 1972, the plaintiff filed a complaint in the United States District Court for the Eastern Division of Wisconsin, alleging that Alida Johns, while a newspaper reporter for The Journal Company, slandered him during conversations with staff members of an Illinois congressman in the late summer of 1970.[1] The case was assigned to the Honorable John W. Reynolds. After status conferences had been held in April and December of 1973, the plaintiff filed a motion for Judge Reynolds to recuse himself. The plaintiff claimed that, because Judge Reynolds

[1] Margoles had earlier filed a two-count complaint against Johns in the federal district court for the District of Columbia on August 19, 1971, but that complaint was dismissed and Johns's motion to quash service of process was granted. *Margoles v. Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973).

had been the Wisconsin Attorney General when matters concerning the plaintiff's state medical license were under consideration by the Wisconsin Medical Examining Board, he would be unable to give the plaintiff a fair trial. Prior to a ruling on the plaintiff's recusal motion, the case was transferred to the Honorable Robert W. Warren.

The parties first appeared before Judge Warren at a pre-trial conference on April 25, 1975. Because Judge Warren had served as Attorney General of Wisconsin from 1969 until his appointment to the district bench in 1974, the plaintiff "expressed [his] concern about, and inquired" whether Judge Warren's prior involvement in matters relating to the plaintiff would impair his ability to try the case impartially. Judge Warren replied that any knowledge of, or involvement in, the plaintiff's affairs he may have had was not of such a nature that he needed to disqualify himself.

On October 23, 1975, the defendants moved for dismissal under Fed. R. Civ. P. 37(b)(2)(C) on the ground that the plaintiff failed to comply with discovery orders entered by Judge Warren in January and April 1975. Judge Warren, on January 5, 1976, after hearing arguments on the matter, granted the motion and dismissed the case. Judge Warren stated:

> [T]he Court is persuaded that [this] is one of the unusual cases in which the Court should and does make a specific finding that the failure to produce herein is willfull, that it is prejudicial, that the matter sought to be produced is highly relevant and material to the case . . . , and that the failure to produce that and comply with the procedural orders of the Court has been so prejudicial that the sanction called for . . . is appropriate, and that the Court does herewith order that the case shall be dismissed.

Judgment of dismissal was entered on January 8, 1976.

On February 4, 1976, the plaintiff moved to vacate the order of dismissal pursuant to Fed. R. Civ. P. 60(b). That same day, the plaintiff filed notice of appeal from the dis-

missal with this court. On March 15, 1976, Judge Warren denied the plaintiff's Rule 60(b) motion. We considered the plaintiff's direct appeal and the ruling on the Rule 60(b) motion together, and after a careful review of the record, we concluded that Judge Warren's finding that the plaintiff willfully refused to comply with discovery orders was supported by the evidence before him, and affirmed the dismissal. *Margoles v. Johns*, 587 F.2d 885, 888 (7th Cir. 1978) ("*Margoles I*"). Neither before us on direct appeal, nor before the district court on his initial Rule 60(b) motion, did Margoles put into issue Judge Warren's disclaimer of bias or his decision not to disqualify himself.

In July of 1980, the plaintiff filed a motion under Fed. R. Civ. P. 60(b)(4), in which he claimed that Judge Warren's failure to recuse himself violated 28 U.S.C. § 455,[2] and thus rendered the 1976 order of dismissal void for want of due process. Judge Warren transferred the motion to the Honorable Terence T. Evans, who denied it on February 25, 1981. Judge Evans held that the issue to be resolved was not whether Judge Warren erred in refusing to recuse himself, but rather whether Judge Warren "*in fact* was so biased or prejudiced against [the plaintiff] that the proceeding was unfair." Judge Evans found that "[w]hile it is true that Judge Warren had some knowledge of the [plaintiff], nothing included in the plaintiff's exhibits leads me to conclude that the judge had a duty to dis-

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[2] In *Margoles v. Johns*, 660 F.2d 291, 300 (7th Cir. 1981), we held that, because Margoles had filed this action before the 1974 amendments to 28 U.S.C. § 455 became effective, his claim that § 455 had been violated by Judge Warren's refusal to step aside was to be determined under the pre-1974 version of the statute, which provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

qualify himself from presiding over this slander case," and concluded that "the documentation submitted by . . . [the plaintiff is] far short of the kind of evidence necessary for him even to get a hearing, let alone carry the day." We affirmed on appeal and adopted Judge Evans's Decision and Order. *Margoles v. Johns*, 660 F.2d 291 (7th Cir. 1981) ("*Margoles II*").

On January 5, 1984, the plaintiff filed a third motion under Fed. R. Civ. P. 60(b)(6) to overturn the judgment in which he claimed to have discovered documents that demonstrated Judge Warren and counsel for the defendants failed to disclose "material extraordinary extrajudicial relationships" existing between them during the time Judge Warren was Attorney General of Wisconsin. The plaintiff argued that Judge Warren should have disqualified himself because of this putative relationship, and that his failure to do so denied the plaintiff due process of law.[3] Judge Evans denied the plaintiff's motion on January 17, 1985.[4] This appeal followed.

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[3] In his motion, the plaintiff requested that Judge Evans recuse himself and assign decision on the Rule 60(b)(6) motion to a federal district judge in another district. Judge Evans denied the plaintiff's request. On January 7, 1985, the plaintiff filed a petition for a Writ of Mandamus with this court, requesting that Judge Evans be ordered to reassign the order. We denied that motion as moot because Judge Evans denied the plaintiff's Rule 60(b)(6) motion. On appeal, the plaintiff challenges Judge Evans's refusal to reassign the Rule 60(b)(6) motion. We find this challenge to be completely without merit, and, therefore, reject it without further discussion.

[4] In *Margoles II*, 660 F.2d at 293, we observed that:

> Although the plaintiff questioned Judge Warren's impartiality at his first appearance before him, that issue was not raised in any . . . post-judgment or appeal proceedings. Although that failure creates substantial questions of waiver and res judicata, . . . the district court did not deem it necessary to reach those issues. We agree with the trial judge in that respect.

The district court denied the plaintiff's Rule 60(b)(6) motion on the ground that, "[h]aving raised the disqualification question anew in 1980, [the plaintiff] is surely barred now, on *res judicata*

(Footnote continued on following page)

II

In considering the plaintiff's motion for relief from judgment under Rule 60(b)(6), we do not directly review the district court's dismissal of the plaintiff's action for failure to comply with discovery orders pursuant to Fed. R. Civ. P. 37(b)(2)(C). *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 112 (7th Cir. 1985) ("[W]e cannot reach the merits of the underlying judgment."); *see also Kagan v. Caterpillar Tractor Co.*, No. 85-2365, slip op. at 9-10 (7th Cir. July 7, 1986). As we noted above, we affirmed the propriety of the dismissal order in *Margoles I*. In the instant case, we must determine only whether the district court abused its discretion in denying the plaintiff's motion under Rule 60(b)(6). *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 560 n.7 (1978); *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 831 (7th Cir. 1985); *Simons v. Gorsuch*, 715 F.2d 1248, 1253 (7th Cir. 1983); *Fuhrman v. Livaditis*, 611 F.2d 203, 204 (7th Cir. 1979). There is, of course, a strong policy favoring the finality of judgments: "[j]udgments in civil cases fix the rights of parties and entitle them to go about their lives [and] may be reopened only for extraordinary reasons." *Metlyn Realty Corp.*, 763 F.2d at 830; *see also Andrews v. Heinhold Commodities, Inc.*, 771 F.2d 184, 188 (7th Cir. 1985); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984); *McKnight v. United States Steel Corp.*, 726 F.2d 333, 335 (7th Cir. 1984); *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 682-83 (7th Cir. 1983). Indeed, we have held that, to find an abuse of discretion under Rule 60(b), the appellate court must be convinced that "no

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[4] *continued*
grounds, from raising it again." The court also noted that, "[n]othing presented in support of the motion, no matter how it is characterized, shows actual unfairness or partiality on the part of Judge Warren." Because we have determined that the plaintiff's motion was without merit, we express no opinion on the *res judicata* question.

reasonable man could agree with the district court's decision." *Tolliver v. Northrop Corp.*, 786 F.2d 316, 318 (7th Cir. 1986); *Simons*, 715 F.2d at 1253; *Smith v. Widman Trucking & Excavating*, 627 F.2d 792, 795-96 (7th Cir. 1983).

Rule 60(b) allows a district court to relieve a party from a final judgment for the reasons specified in subsections (1) through (5).[5] In addition, subsection (6) provides that the court may grant a motion under Rule 60(b) for "any other reason justifying relief."[6] Nevertheless, relief under

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[5] Fed. R. Civ. P. 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

[6] Relief under Rule 60(b)(6) is appropriate only if the grounds asserted for relief do not fit under any of the other subsections of Rule 60(b). *Klapprott*, 335 U.S. at 613, 69 S. Ct. at 389-90; *Industrial Associates, Inc.*, 787 F.2d at 269; *Bershad v. McDonough*, 469 F.2d 1333 (7th Cir. 1972). Otherwise, a movant could use subsection (6) to circumvent the rather demanding time limitations placed on a motion under subsections (1) through (3).

There is no such time limitations placed on subsection (4) motions for setting aside a judgment as void. As we held in *Alskar v. Honeywell, Inc.*, 95 F.R.D. 419 (7th Cir. 1982), "the reasonable time criterion of Rule 60(b) as it relates to void judgments, means no time limit, because a void judgment is no judgment at all." Hence, "the court that entered a void judgment may vacate it

(Footnote continued on following page)

60(b)(6) is warranted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust. *Ackerman v. United States*, 340 U.S. 193, 71 S. Ct. 209 (1950); *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384 (1949); *Kagan*, slip op. at 15. *Industrial Associates, Inc. v. Goff Corp.*, 787 F.2d 268, 269 (7th Cir. 1986); *Merit Insurance Co.*, 714 F.2d at 682-83.

The plaintiff claims that the documents attached to his Rule 60(b)(6) motion demonstrated (1) that an Assistant Wisconsin Attorney General, during the time Judge Warren served as the Wisconsin Attorney General, communicated with counsel for the defendants in the original slander suit and exchanged information with them concerning that suit, and (2) that the office of the Attorney General had used a reporter for the defendant newspaper to investigate the plaintiff in regard to his efforts to regain his medical licence. The plaintiff argues that the existence of these "relationships" denied him due process, and constituted extraordinary circumstances making relief under Rule 60(b)(6) appropriate. We disagree.

We have thoroughly examined the documents underlying the plaintiff's motion. Some of those documents relate to events that occurred *before* Judge Warren was elected At-

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[6] *continued*

at any time." *Rodd v. Region Construction Co.*, 783 F.2d 89, 91 (7th Cir. 1986). In addition, although the elapse of a specific period of time between the entry of judgment and the ruling on the motion for relief is not determinative of a motion under subsection (6), *Sudeikis v. Chicago Transit Authority*, 774 F.2d 766, 769 (7th Cir. 1985) ("There is no hard and fast rule as to how much time is reasonable for the filing of a Rule 60(b)(6) motion."), because of the high value the framers of Rule 60(b) set on the societal interest in the finality of litigation, the motion must be brought within a reasonable time. One must consider the facts of each case, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and the prejudice to other parties if the judgment is revisited, in determining whether the time elapsed was reasonable. *Kagan v. Caterpillar Tractor Co.*, No. 85-2365, slip op. at 16 (7th Cir. July 7, 1986).

torney General of Wisconsin, and hence, before he could be said to have any involvement in either the slander lawsuit or the plaintiff's other lawsuits. Some documents were part of the records in other litigation the plaintiff has pursued. These included depositions, motions, and court orders. Most of the remaining documents chronicle the plaintiff's dispute in 1983 with the office of Wisconsin Attorney General over the production of investigative files and the like, for use in the instant Rule 60(b)(6) proceedings, or for use in the plaintiff's other litigation. We have concluded that these documents neither compromise Judge Warren's decision not to disqualify himself, nor impugn the justness of the proceedings leading to the dismissal order.

Those few documents that bear on the alleged relationship between Judge Warren, during the period when he was Attorney General, and counsel for the defendants are either totally inconclusive of the nature of that "relationship," if such it be, or patently innocuous. On the basis of the record before us, we conclude that the "exchange of information," which constitutes the gravamen of the plaintiff's Rule 60(b)(6) motion, involved essentially the exchange of court documents that were part of the record, including depositions of the plaintiff and other parties, in a lawsuit which the plaintiff had brought and in which the office of the Wisconsin Attorney General was defending.[7]

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[7] Exhibit B-4 included, among the items sent by the Wisconsin Attorney's General office to counsel for the defendants in the slander suit, an item entitled "Copies of written communications with State of Illinois." The plaintiff does not suggest, nor can we perceive on the basis of the record before us, what significance these "communications" might have on the question of the nature of the putative relationship between defense counsel and Judge Warren's office, during the period of time he was Attorney General. Nor is there any indication that these documents bear on material disputed facts in the slander case. The other documents listed in Exhibit B-4 were either depositions or copies of the complaint, summons, etc., in another lawsuit the plaintiff had brought.

As to the plaintiff's claim that Judge Warren's former office made use of one of the defendant newspaper's employees to investigate him, it is true that the Wisconsin Attorney's General office did call upon a person to investigate Margoles in regard to a matter unrelated to any material issues in the slander suit.[8] That "relationship" developed several years before Judge Warren was elected Attorney General, and did not involve his administration of that office. In addition, this occurred when the investigator was not an employee of the defendants. There is also some indication that this person was called upon to provide information to the Attorney General subsequent to Judge Warren's election to that office and after the person became a reporter for the defendants. Nevertheless, the documents of record shed absolutely no light on whether the information requested or provided was relevant to any material factual issues that might have been disputed in the instant action.[9] Therefore, the existence of this "relationship," if such it be, does not present the "extraordinary circumstances" necessary to warrant relief under Rule 60(b)(6).

Even assuming that Judge Warren knew of these activities and the communications between his office and coun-

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[8] The statements forming the basis of the plaintiff's slander suit were allegedly made in August and September of 1970. The alleged events to which the plaintiff points to occurred well before that.

[9] The plaintiff makes unsupported allegations that the Wisconsin Attorney's General office improperly withheld documents that might have enabled him to substantiate his claim that this relationship continued into the time Judge Warren was Attorney General and biased Judge Warren against the plaintiff. The plaintiff raised these allegations before the district court. That court, therefore, had these allegations before it in passing on the plaintiff's Rule 60(b)(6) motion, and obviously found them inconsequential. We cannot say that the court erred in so doing. We note also that the Wisconsin Open Records Act, Wis. Stat. 19.21-19.37, provides a basis for the plaintiff to attempt to gain access to these records. We note that the plaintiff requested these documents pursuant to the Act, but the record does not disclose whether the plaintiff has exhausted the channels of relief provided him by that Act.

sel for the defendants in the underlying slander case, the evidence and reasonable inferences drawn from it are woefully inadequate to warrant relief under Rule 60(b)(6). The plaintiff's claim that these documents establish that Judge Warren stood in an "of counsel" relationship to defense counsel is groundless. Likewise, the claim that Judge Warren had a "substantial interest" in the case is totally unfounded.[10] The plaintiff clearly has failed to demonstrate extraordinary circumstances that create a substantial danger of an unjust result.[11] *Merit Insurance Co.*, 714

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[10] The terms "of counsel" and "substantial interest" appeared in 28 U.S.C. § 455 prior to its amendment in 1974. We held in *Margoles II*, 660 F.2d at 300, that the unamended § 455 was applicable to the issue whether Judge Warren improperly failed to disqualify himself. By our use of those terms now, we do not mean to suggest that the relevant question before us is the propriety under § 455 of Judge Warren's decision not to recuse himself. The only question we must consider to dispose of the plaintiff's appeal from the denial of his Rule 60(b)(6) motion is whether the evidence he adduced created a substantial danger of an unjust result. Insofar as the plaintiff argues that Judge Warren had a substantial interest in the outcome of the slander suit or that he acted of counsel to the defense attorneys in that suit, we consider whether the plaintiff's proof of such a relationship (and we do not mean to suggest that the plaintiff has made such a showing) created a substantial danger of an unjust result, not whether Judge Warren should in fact have recused himself. As we noted above, we find that the plaintiff's evidence is inadequate to meet the requirements of Rule 60(b)(6).

[11] The plaintiff argues that he need not demonstrate that Judge Warren was actually biased or partial in order to prevail on his Rule 60(b)(6) motion. The plaintiff maintains that the proper threshold of proof would be that of an appearance of partiality. We disagree. As we recently noted in *United States v. Balistrieri*, 779 F.2d 1191, 1204-5 (7th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 3284 (1986), the improper failure of a judge to recuse himself due to an appearance of partiality constitutes an "injury to the judicial system as a whole and not to the substantive rights of the parties," and hence, cannot rise to the level of reversible error. *See also United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). The plaintiff's argument that *Balistrieri* applies only to § 455 in its amended form, even if we were to find it persuasive (which

(Footnote continued on following page)

F.2d at 682-83. We hold, therefore, that the district court did not abuse its discretion in denying the plaintiff's Rule 60(b)(6) motion.

III

The defendants-appellees have requested that we assess fees and costs against the plaintiff pursuant to Fed. R. App. P. 38. Although we do not ordinarily grant such requests, we have determined that this appeal was frivolous, and, therefore, assess the plaintiff-appellant $2,500.00 in fees, costs, and damages. For the reasons stated above, the district court's order dismissing the plaintiff's motion under Fed. R. Civ. P. 60(b)(6) is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[11] *continued*
we do not), is inconsequential. If the appearance of bias cannot rise to reversible error in the context of an appeal from a judge's failure to disqualify himself, it follows *ipso facto* that it cannot be sufficient to create a substantial danger of an unjust result. Therefore, to prevail on his Rule 60(b)(6) motion, the plaintiff must demonstrate actual bias, not an appearance thereof.

USCA 60054—Midwest Law Printing Co., Inc., Chicago—8-20-86—450

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 20, 1986

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

DR. MILTON MARGOLES, Plaintiff-Appellant,	) Appeal from the) United States) District Court
No. 85-1267 vs.	) for the Eastern) District of
ALIDA JOHNS and THE JOURNAL COMPANY, a Corporation, Defendants-Appellees.	) Wisconsin.) No. 72 C 470) Judge Terence T.) Evans

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 17, 1986

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Jesse E. Eschbach, Senior Circuit Judge

DR. MILTON MARGOLES, Plaintiff-Appellant,	) Appeal from the) United States) District Court
No. 85-1267 vs.	) for the Eastern) District of
ALIDA JOHNS and THE JOURNAL COMPANY, a Corporation, Defendants-Appellees.	) Wisconsin.) No. 72 C 470) Terence T.) Evans, Judge.

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant, Margoles, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DR. MILTON MARGOLES,

Plaintiff,

v. Civil Action

ALIDA JOHNS and the JOURNAL COMPANY, a corporation, No. 72-C-470

Defendants.

DECISION and ORDER

> "'Tis known by the name perseverance in a good cause, and obstinacy in a bad one."
>
> - Laurence Sterne (1713-1768)

The tortured history of this case, which began in 1972, is detailed in Margoles v. Johns, 660 F.2d 291 (7th Cir. 1981). It need not be repeated here. Like a Turle Wax shine, however, this case will not fade away. It is here again on a renewed Rule 60 (b) motion which seeks essentially the same relief sought in a Rule 60(b) motion filed in 1980. The denial of the 1980 Rule 60(b) motion (the second such motion that was filed here; the

first was filed in 1975 and its denial was affirmed in Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978)) was affirmed in the decision reported at 660 F.2d 291. Margoles' petition for a writ of certiorari was denied. 455 U.S. 909 (1982).

On January 5, 1984, Margoles filed his present motion, which was assigned to me by Chief Judge John W. Reynolds. Because the present motion raises, to use Margoles' words, "sensitive and substantial issues of judicial/attorney misconduct" involving Judge Robert W. Warren of this district and James P. Brody of the Milwaukee law firm of Foley & Lardner, he asks that I recuse myself and take steps to have this matter transferred to a judge from outside the Seventh Judicial Circuit. Because this motion must so obviously be denied, I believe the case need not be reassigned and, accordingly, I decline to recuse myself.

Margoles' new motion is based, at least in

part, on what he says is "new evidence" uncovered in 1983 under the Wisconsin open records law. Reduced to its essence, the "new evidence" is said to support two claims:

(1) that the office of the Attorney General of Wisconsin exchanged some information with the firm of Foley & Lardner, particularly Attorney Brody, and that this made Robert Warren, as the Attorney General of Wisconsin, "co-counsel" with Foley & Lardner and gave Warren extra-judicial knowledge or information about this case; and

(2) that Warren, while holding the position of Attorney General, utilized the Milwaukee Journal Company to investigate Dr. Margoles.

Margoles makes sweeping and repeated accusations of "extraordinary extra-judicial relationships," of a "symbiotic relationship" between defendants' attorneys (Foley & Lardner and Mr. Brody) and an assistant Attorney General, and of "breaches of ethics manifesting rank bad faith." The basis for these allegations is found in:

(1) evidence that Sverre Tinglum, an Assistant Attorney General, sent Attorney Brody some court papers in a Western District case involving Margoles, and that the two had an exchange of three letters in February-March, 1974;

(2) evidence that another Assistant Attorney General, John Armstrong, said that Tinglum had maintained communications with Journal Company attorneys and that another Assistant Attorney General, Charles Larsen, acknowledged some communications; and

(3) evidence that Assistant Attorney General LeRoy Dalton had two telephone conversations with a James Wieghart, a former Milwaukee Sentinel reporter, in September, 1965.

Incredible as it is, considering the mountain of paper and the serious accusations hurled indiscriminately at Judge Warren and James Brody, that is all his entire motion rests on. His showing is insufficient, and it is also precluded as a matter of law.

The issue of Judge Warren's disqualification was resolved in the original proceedings when he declined to recuse himself on plaintiff's inquiry and the plaintiff failed to raise the matter on appeal. Waiver and res judicata precluded the raising of the issue again but, because of its personal nature, I decided to reach the merits of the issue in my decision denying the 1980 motion. In affirming my decision on the merits, however, the Court

of Appeals noted that plaintiff's failure previously to have raised the question of Judge Warren's partiality when he had opportunities to do so "creates substantial questions of waiver and res judicata." Margoles v. Johns, 660 F.2d 291, 293 (7th Cir. 1981). Having raised the disqualification question anew in 1980, Margoles is surely barred now, on res judicata grounds, from raising it again. There must be finality somewhere in the system, and that point has now been passed.

I believe that one final comment here should be made. Nothing presented in support of the motion, no matter how it is characterized, shows actual unfairness or partiality on the part of Judge Warren. In retrospect, however, it may have been more prudent for him to have passed this chestnut to another judge only because it would have been the less troublesome thing to do. The office that Warren headed did defend the State on matters involving Dr. Margoles (a fact, of

course, that was known by all) and, as good lawyers do, the State lawyer actually handling the case conferred with a private lawyer (Brody) representing private defendants in an unrelated matter (this case) being pursued by the doctor. Even though, and this seems clear, Warren had no actual knowledge of what was going on, problems could have been avoided by passing the case. Now, however, we are past the point where "appearances" matter and are concerned only with actual prejudice. Quite simply, there is none here. The third Rule 60(b) motion is DENIED.

SO ORDERED at Milwaukee, Wisconsin, this 17 day of January, 1985.

BY THE COURT:

/s/

TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny

to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. ***A party may file only one such affidavit in any case.*** It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

(emphasis added)

28 U.S.C. § 455
(prior to 1974 amendment)

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

FED.R.CIV.P. 60 (B):
RELIEF FROM JUDGMENT OR ORDER

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD; ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655,

or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(2)

No. 86-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[The proceeding before the Court, commenced by a Rule 60(b)(6) motion in 1984, is the second collateral attack by plaintiff Margoles on a 1976 judgment of dismissal (by District Judge Warren) which had been affirmed by the Court of Appeals and as to which this Court had denied certiorari. 587 F.2d 885 (7th Cir. 1976, pub. 1978), *cert. denied*, 430 U.S. 946 (1977). The first collateral attack, a Rule 60(b)(4) motion filed in 1980, was denied, in a decision (by District Judge Evans) affirmed by the Court of Appeals and as to which this Court denied certiorari. 660 F.2d 291 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). Margoles seeks again, in this second collateral attack, to void the 1976 judgment on the ground he was denied due process because the district judge who ordered the case dismissed in 1976 had not recused himself.]

There is no issue for review on certiorari. The only question, an evidentiary one, is:

1. Whether the Court of Appeals erred in holding that the District Court (Judge Evans) did not abuse its discretion in denying petitioner's Rule 60(b)(6) motion.

RULE 28.1 LISTING

Respondent, The Journal Company, is a corporation ninety percent owned by an employee trust and the balance by several family trusts. It is now known as Journal Communications, Inc. through a corporate change of name effective January 1, 1987. It has no subsidiaries other than wholly owned subsidiaries and is not affiliated with any other company.

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TABLE OF AUTHORITIES

No. 86-1631

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 798 F.2d 1069, is set forth in the appendix to the petition, pp. A-1 through A-12. The Decision and Order of the district court, not reported, is set forth at pages A-15 through A-20 of the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1986 (A-13) and Petitioner's motion for rehearing by that Court was denied by order entered November 17, 1986. (A-14) Petitioner sought and obtained from this Court an extension of time to file his petition. The petition filed within that time was returned by the Clerk for non-compliance with Rule 33 and the petition was re-filed on or about April 7, 1987.

STATEMENT OF THE CASE [1]

Original Case (1972-1977)

Margoles' complaint was filed on August 18, 1972.[2] It claimed allegedly slanderous telephone conversations between the defendant, Alida Johns, and members of the staff of United States Congressman McClory in August-September, 1970. The defendants denied that any of the allegedly slanderous statements were made and denied all other material allegations.

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[1] Petitioner's Statement contains numerous assertions and argumentative conclusions not supported by the record or the decisions below. Respondents therefore submit their summary of the original proceedings in this case (1972-77), the first collateral attack proceedings (1980-81), and the second collateral attack below which led to the current petition. Elsewhere in this brief specific response will be made to the argument in petitioner's Statement.

[2] Margoles had filed a predecessor case containing the same allegations in the District of Columbia in 1970. That case was dismissed on jurisdictional grounds. *Margoles v. Johns*, 333 F.Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973).

After status conferences had been held before Judge Reynolds in April and in December, 1973, Margoles moved that Judge Reynolds recuse himself in June, 1974. Subsequently, without any ruling on the recusal motion, this case was one of those transferred to Judge Robert W. Warren upon his appointment to the bench in October, 1974.

The parties first appeared before Judge Warren at a pre-trial conference on April 25, 1975. Margoles' then-attorney, Mr. Giampietro, in the language of his current counsel, Perry Margoles, "expressed Margoles' concern about, and inquired" as to whether Judge Warren's having been Wisconsin Attorney General when the department he headed was in an adversarial role to Margoles would affect his ability to be impartial. Judge Warren said he had not had such contact with any Margoles matters as would cause a problem, disclaimed any bias, and did not disqualify himself. [Opinion of District Court, February 25, 1981; set forth in *Margoles v. Johns*, 660 F.2d 291, 293 (7th Cir. 1981)]. Margoles said nothing further about the matter in any proceeding before Judge Warren.[3]

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[3] While it is not an issue here, Margoles' claim (Petition, p. 6) that he could not have brought a disqualification motion against Judge Warren in 1974-76 because he had already moved against Judge Reynolds, is incorrect. 28 U.S.C. § 144 only bars filing more than one incontestable affidavit of prejudice. Challenges to judicial bias can arise not only on motions under § 144, but also on motions brought solely under 28 U.S.C. § 455 [e.g., *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977)], on motions purporting to be under § 144 even when procedurally improper [*Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980)], and on motions which are related to no particular authority whatever beyond the desire of the movant to be rid of the sitting judge [*United States v. Sciuto*, 531 F.2d 842 (7th Cir. 1976)]. It

(Footnote continued on following page)

Judge Warren dismissed the case on January 8, 1976, for Margoles' willful disobedience of discovery orders. Margoles then filed his first Rule 60(b) motion (not on the ground of judicial partiality, but on other grounds), which the trial court denied, and he then appealed from the judgment of dismissal and the order denying the Rule 60(b) motion. The Court of Appeals affirmed. *Margoles v. Johns*, 587 F.2d 885 (7th Cir. 1976, reported in 1978).

After the Court of Appeals had ruled, Margoles' son, Perry Margoles, substituted as plaintiff's attorney and has continued to represent his father in all subsequent proceedings in this case. Margoles moved for a rehearing, which the Court of Appeals denied. This Court denied Margoles' petition for certiorari, 430 U.S. 946 (1977), and his petition for rehearing, 432 U.S. 926 (1977). Margoles did not raise any issue concerning Judge Warren's refusal to recuse himself either in his first Rule 60(b) motion or in any of those appellate proceedings.[4]

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[3] *continued*
would seem to be a truism that if, as Margoles claims, he now has a right, long after judgment, to claim prejudice because of Judge Warren's presence in the case, he had that same right ten years ago.

[4] Margoles claims (Petition, p. 7) he did not appeal Judge Warren's refusal to recuse himself because the Seventh Circuit did not allow writs of mandamus to review recusal issues, citing *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). In *SCA Services*, noting the historic inapplicability of mandamus to review § 144 motions, the court issued a writ to compel withdrawal of a district judge under 28 U.S.C. § 455. Although not in issue here, Margoles had that right in 1975 and failed to exercise it. *See, e.g., In re I.B.M.*, 618 F.2d 923 (2nd Cir. 1980); *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965). He also could have included his challenge to Judge Warren in his first Rule 60(b) motion and in his subsequent appeal, but failed to do so.

First Collateral Attack (1980-1981)

Over three years later, in July, 1980, Margoles filed his second Rule 60(b) motion which Judge Warren assigned to Judge Evans. Margoles now claimed that he had been denied due process and that the 1976 judgment was void under Rule 60(b)(4), because, he alleged for the first time, Judge Warren should have disqualified himself in 1975 when Margoles raised his question about impartiality at the pretrial conference. His motion was based on forty-three exhibits attached to the affidavits of his son and attorney, Perry Margoles. Most of the "evidence" on which he based his motion had been known to him prior to the entry of Judgment in 1976. Only ten of the forty-three exhibits arguably had come to his attention after that date. [Opinion of District Court, February 25, 1981; set forth in *Margoles v. Johns*, 660 F.2d 291, 301 (7th Cir. 1981)].

Margoles' attack on Judge Warren in 1980 was based on the fact that the office of the Attorney General of the State of Wisconsin, as legal representative of the State, had represented the public defendants in two lawsuits Margoles had brought against the State's Board of Medical Examiners and others.[5] Warren did not personally handle

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[5] One of these suits involved Margoles' third unsuccessful application for reinstatement of his Wisconsin medical license, *see, Margoles v. Wisconsin State Board of Medical Examiners*, 47 Wis. 2d 499, 177 N.W.2d 353 (1970), a license which had been revoked in 1962. *See, State v. Margoles*, 21 Wis. 2d 224, 124 N.W.2d 37 (1963).

The second of these suits, filed in the United States District Court for the Western District of Wisconsin, is the one Margoles describes as his "first defamation" action (Petition, p. 4) to liken it to this case. In fact, while Margoles was also plaintiff in the Western District suit (the defendants were different, of course), and slander was also alleged, there was a wide range of different

(Footnote continued on following page)

either case. (*E.g.*, Pl. Exs. 17, 35, 37) Judge Evans ". . . carefully reviewed the documentation submitted by Dr. Margoles . . . and [found] it far short of the kind of evidence necessary for him to even get a hearing, let alone carry the day. . . ." He "examined the materials and concluded that they do not demonstrate any lack of impartiality on the part of Judge Warren." *Id.* at 301.

Judge Evans further held that even if, instead of the due process issue raised by collateral attack, the issue of recusal was being initially and directly examined, Judge Warren had no duty, under the facts of record, to recuse himself under the federal recusal statute, 28 U.S.C. § 455, either in its amended or pre-amendment form.

The Court of Appeals affirmed the District Court's denial of the second Rule 60(b) motion and adopted the District Court's decision as its opinion. *Margoles v. Johns, et al.*, 660 F.2d 291 (7th Cir. 1981). This Court denied Margoles' petition for certiorari. 455 U.S. 909 (1982).

Second Collateral Attack (1984-1987)

On January 5, 1984, Margoles filed his third Rule 60(b) motion. The forty exhibits (numbered B-1 - B-40) attached

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[5] *continued*
issues in the two cases. The Western District case included claims of civil rights violations, conspiracy, and denial of due process by a state board. The alleged "common" issue, slander, related to conversations between entirely different people at times and places widely separated from the slander alleged in this case. The decisions in the Western District case were based principally on statute of limitations, governmental immunity, and conspiracy issues. *See Margoles v. Ross*, 67 F.R.D. 666 (W.D. Wis. 1975); *Margoles v. State Board of Medical Examiners*, 446 F.Supp. 959 (W.D. Wis. 1978), *modified*, 588 F.2d 832 (7th Cir. 1978); *Margoles v. Tormey*, 643 F.2d 1292 (7th Cir.), *cert. denied*, 452 U.S. 939 (1981).

to Perry Margoles' affidavit which accompanied the motion in large part relate to Margoles' document disputes with the Wisconsin Attorney General's office (then headed by Attorney General Bronson LaFollette) in his Western District litigation in 1979 (Pl. Exs. B-14 - B-23) and to extra-litigation disputes with that office under the Wisconsin Open Records Law in 1983. (Pl. Exs. B-24 - B-40). Margoles also re-incorporated in his motion Exhibits 1-43, the same exhibits used for his second Rule 60(b) motion denied in 1981. Indeed, the bulk of Margoles' latest motion, in 1984, paragraphs 8-19, was a verbatim repetition of the same argument and "evidence" which had been in his rejected motion in 1980.

Margoles claimed his current motion is also based on "new evidence."[6] That material consists of some documents which show that an assistant attorney general had some "communication" with counsel for Respondents relating to the instant case and to the Margoles suit then pending in the Western District. (See, note 5, *supra*) Those documents also show that another person in the office of the Attorney General had had conversations concerning Margoles with James Wieghart, who was at the time of

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[6] Petitioner refers to Wisconsin's "newly enacted" open records law as enabling him for the first time to see certain state records. (Petition, p. 10) Any suggestion that this means of obtaining access to public records first became available to Margoles after January 1, 1983 is not correct. The "new" law, except for some new procedures, penalties and a few exceptions, by its own terms continued the pre-existing substantive law. Sec. 19.35, Wis. Stats. (1984). Under that pre-1983 law, records in the custody of a public custodian were equally open to inspection. Section 19.21(2), Wis. Stats. (1979), provided that except as "expressly provided otherwise", public records could be examined or copied by "any person", and the public policy of the State strongly favored inspection. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965).

one of those conversations a reporter in the employ of the Journal Company. Those conversations occurred in 1965 (when he was not employed by the Journal Company) and 1968, respectively seven and four years prior to the commencement of this lawsuit, and prior to the time Judge Warren became Attorney General of the State of Wisconsin (January 1, 1969).[7] Margoles asserted that these communications show a "relationship" between the Respondents and Judge Warren which disqualified Judge Warren from the case.

In his Decision of January, 1985, affirmed by the Court of Appeals, Judge Evans reviewed the materials upon which the current motion is based. (A-17 - 18) He found the disparity between the "serious accusations hurled indiscriminately" at court and counsel and the lack of evidence supporting such charges to be "incredible" and held Petitioner's showing was "insufficient." (A-18)[8]

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[7] Petitioner's observation (Petition, p. 11) that the second of these two conversations occurred "after the election in 1968 of Warren as Attorney General" might be literally correct, depending on the time of day, because the conversation occurred on November 5, 1968 (Pl. Ex. 14), which was election day that year. However, the contact did not occur during the term of Judge Warren as Attorney General. He did not assume the position of Attorney General until January, 1969.

[8] In the second Rule 60(b) proceedings, in 1980-1981, the trial and appellate courts found, as Judge Warren himself had stated, that as Attorney General he had not had such contact with Margoles matters as would create any problem, and that Margoles' "evidence" of Judge Warren's knowledge and involvement in Margoles matters was inadequate. *See*, 660 F.2d at 293, 298, 300, 301. Petitioner's argument to the contrary in the current proceeding is based solely upon precisely the same exhibits and contentions he presented then and even to this Court. *Compare*, Current Petition, p. 4, n. 3, *with* Petition in No. 81-967 (Nov. 21, 1981), p. 5.

The Court of Appeals affirmed. The Court stated it had "thoroughly examined the documents underlying the plaintiff's motion"[9] and "concluded that these documents neither compromise Judge Warren's decision not to disqualify himself, nor impugn the justness of the proceedings leading to the dismissal order." (A-8 - 9) The Court determined Petitioner's "evidence" to be "either totally inconclusive" or "patently innocuous" (A-19) and "woefully inadequate to warrant relief under Rule 60(b)(6)." (A-11)

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no issue warranting review by this Court on certiorari. The Court is being asked to reexamine facts which Petitioner asserts demonstrate denial of due process but which the courts below have carefully examined and found to be without merit.

This case is of no interest to any one other than the litigants. It raises no new, interesting or controversial legal issues and presents no special or important reason why this Court should accept it for review.

Shorn of the extravagant hyperbole of Petitioner, this case merely reasserts Margoles' skewed perception of judicial partiality which was expressly denied by the original district judge in 1975, was determined meritless by another

[9] Petitioner apparently overlooks this description by the Court of its efforts when he accuses the Court of "omitting and fundamentally changing the primary issues, exhibits, and standards of review" (Petition, p. 17) and of having "analyzed only [a] secondary exhibit, out of context . . . ." (*Id.* n. 5a)

district judge and the appellate court in 1980, and was again found to be baseless by the courts below in the current proceedings. Those findings were based upon a thorough and careful review of Petitioner's "evidence."

The petition raises no valid legal issues but only evidentiary questions. The issue in a collateral attack brought on the grounds urged by Petitioner is whether he was in fact denied due process. The decisions below correctly determined that Petitioner's concerns were factually baseless. There is no conflict of decisions on any issue presented by this case, and it presents no important question of law requiring decision by this Court.

I.

ISSUE BELOW WAS FULLY CONSIDERED

In spite of the facial baselessness of Margoles' attack, Margoles' "evidence" of misconduct or judicial partiality was fully considered below. Margoles had liberal opportunity to present his case: the Court of Appeals considered (and denied) his petitions for mandamus to Judge Evans and for reconsideration (and for expedition of the other petitions) which immediately preceded his appeal; granted his motion for an extension of time to file his appellant's brief; granted his motion to file a supplemental brief; granted his motion to transcribe the recording of oral argument; granted his motion to file a post-oral argument supplemental brief; and granted his post-judgment motion for an extension of time to petition for rehearing. Petitioner was given more than his day in court.

The Court of Appeals assessed Margoles' "evidence" against the correct standard. Margoles incorrectly argues (Petition, p. 17) that the Court of Appeals "misstated the applicable criterion for disqualification," citing a footnote to the Court's decision in which the Court expressed dis-

agreement with one element of Margoles' argument that relief here was appropriate upon a showing of a mere appearance of partiality. (A-11, n. 11)[10]

While the Court did by footnote dispose of the contention that appearances alone were sufficient in this collateral attack on a judgment, the entirety of its consideration and rejection of Margoles' claim was responsive to his contention that Judge Warren was in fact biased and unable to afford Margoles fairness and due process. It was Margoles' "evidence" offered in support of these allegations that the Court found "woefully inadequate." (A-11) The Court was considering and applying correctly the standard of Rule 60(b)(6) when it expressly held:

> "The plaintiff clearly has failed to demonstrate extraordinary circumstances that create a substantial danger of an unjust result." (A-11)

II.

ISSUE BELOW WAS CORRECTLY DECIDED

A. The Correct Standard Of Review Was Applied

Margoles accuses the Court of Appeals of "omitting and fundamentally changing the . . . standards of review" to be applied in this case. (Petition, p. 17) In fact the Court applied correctly the standard adopted in every federal circuit. The Court held its duty on review of the denial of a Rule 60(b)(6) motion is to "determine only whether the district court abused its discretion in denying the"

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[10] Although he professes otherwise to this Court (Petition, pp. 18-19), Margoles had made that argument below (See, App. Br. at 22-24) and had cited numerous cases in which the issue of judicial recusal had arisen on direct review rather than by collateral attack on a judgment. (See, Appellees' Br. at 21-23).

motion. (A-6) That standard of review is applied in like cases throughout the entire federal appellate system.[11] In the Seventh Circuit, this standard is articulated as requiring for reversal a finding that "no reasonable person could agree with the district court's decision." *E.g., Tolliver v. Northrop Corp.*, 786 F.2d 316, 318 (7th Cir. 1986). In the case at bar and upon Margoles' showing, no reasonable man could fail to agree with the district court's decision. Indeed, the Court of Appeals went beyond the accepted standard to make it clear that there was no evidence which supported Margoles' position. (A-9 - 11)

B. There Is No Evidence Justifying Relief From The Judgment

Rule 60(b)(6), Fed. R. Civ. P., authorizes the vacation of a judgment "for any reason [other than those specified in subsections (1) - (5)] justifying relief from the operation of the judgment." Petitioner asserts, as the reason justifying relief, that Judge Robert W. Warren was party to "an extraordinary judicial relationship" (Petition, p. 26) with counsel for Respondents while he served as Attorney General of Wisconsin (1969-1974).

In 1975, Judge Warren disclaimed any knowledge of Margoles matters that would prevent him from sitting in

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[11] *E.g., Manning v. Trustees of Tufts College*, 613 F.2d 1200 (1st Cir. 1980); *Matter of Emergency Beacon Corp.*, 666 F.2d 754 (2nd Cir. 1981); *Ross v. Meagan*, 638 F.2d 646 (3rd Cir. 1981); *Transportation, Inc. v. Mayflower Services, Inc.*, 769 F.2d 952 (4th Cir. 1985); *Roberts v. Rehoboth Pharmacy, Inc.*, 574 F.2d 846 (5th Cir. 1978); *Smith v. Secretary of Health & Human Services*, 776 F.2d 1330 (6th Cir. 1985); *Slater v. KFC Corp.*, 621 F.2d 932 (8th Cir. 1980); *United States v. Sparks*, 685 F.2d 1128 (9th Cir. 1982); *Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062 (10th Cir. 1980); *Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984); *Harjo v. Andrus*, 581 F.2d 949 (C.A.D.C. 1978).

this case. In 1981, the Court of Appeals, after careful review of the record, agreed and found no evidence of such knowledge. *Margoles v. Johns*, 660 F.2d 291 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). In the current motion, Margoles has offered very little new evidence and no evidence of any such knowledge.

Confining attention to his "evidence" not already found inadequate several years ago, Margoles' intemperate assertion is based entirely upon: (1) three brief letters in February and March, 1974 between an assistant attorney general of Wisconsin, Sverre Tinglum, and one of Respondents' attorneys, James P. Brody, relating to Mr. Brody's request for and receipt from Mr. Tinglum of some public materials from Margoles' pending civil rights case (Exs. B-5 - 7); (2) a letter written one year later from another assistant attorney general to Wisconsin Attorney General LaFollette (Judge Warren having resigned his office to assume the federal bench in October, 1974) suggesting that Sverre Tinglum, having since gone into private practice, should be retained specially to continue his representation of the State Board of Medical Examiners and noting, in a list of numerous other of his activities, that Tinglum had been "maintaining communications with the attorneys for the Milwaukee Journal Company" (Ex. B-1); and (3) evidence that another assistant attorney general, LeRoy Dalton, had had two telephone conversations concerning Margoles in 1965 (Exs. B-8 - 9) and one in 1968 (Ex. 14) with a James Wieghart. Wieghart was a *Sentinel* reporter in 1968; Judge Warren was not yet Attorney General. In 1965, Wieghart was not a reporter but was in Washington, D.C. as a senator's press secretary and later a legislative staff person. (Aff. of Robert Wills of Feb. 1, 1984, ¶¶ 4-5) [Margoles knew of these conversations, but did not refer to them, when he filed his Rule 60(b)(4) motion in 1980. (*See*, Exs. 14, B-22)]

That "evidence" prompted Judge Evans to express:

> Incredible as it is, considering the mountain of paper and the serious accusations hurled indiscriminately at [court and counsel], that is *all* his entire motion rests on. (A-18) (original emphasis)

Margoles has offered no evidence that the office of the Attorney General of the State of Wisconsin, let alone Attorney General Warren, received any evidentiary information concerning Margoles from Respondents or their counsel. There is no evidence that that office learned from counsel any information which conceivably could cause Judge Warren to be biased or even to have any knowledge of the instant case even if Judge Warren personally had been aware of the communications which did occur.

The "information" exchanged was of public record in any event and was innocuous, as noted by the court below. (A-9 - 11) Margoles' exhibits show that from Mr. Brody, assistant attorney general Tinglum asked for and learned in March, 1974 that a status conference had been scheduled in this case and that a trial in that calendar year was unlikely. (Ex. B-7) From Mr. Tinglum, Mr. Brody received a copy of the pleadings filed in Margoles' civil rights action against the State Board of Medical Examiners and employees, copies of some depositions taken in that case, and copies of written communications with the Illinois Medical Examining Board. (Ex. B-5) Margoles cannot and does not claim that those documents were anything but innocuous, but he seeks to draw unwarranted inferences that they evidenced a close working relationship.

It is, as Judge Evans expressed, "incredible" that Margoles would base his extravagant allegations upon such a minor and routine professional courtesy.

Most important, there is not a sliver of evidence that Judge Warren personally knew of any of these matters. Wisconsin's Attorney General is elected to office and is the senior official of the Wisconsin Department of Justice. That Department is responsible for providing to the state an array of legal services, both civil and criminal, statewide law enforcement, and criminal investigations. Chapter 165, Wisconsin Statutes (1969, 1985) The office of the Attorney General during the years Judge Warren held that office had almost 500 employees and, at any one time, presented and defended literally thousands of cases. *Margoles v. Johns*, 660 F.2d 291, 301 (1961), citing *In Matter of Searches*, 497 F.Supp. 1283 (E.D. Wis. 1980). It is therefore not surprising that Judge Warren has, as a matter of uncontroverted record in this case, stated that he had not had such contact with any Margoles matters as would cause a problem and has affirmatively disclaimed any bias. *Id.*, 660 F.2d at 293.

Margoles cites *Aetna Life Insurance Co. v. Lavoie*, ____ U.S. ____, 106 S. Ct. 1580 (1986) (Petition, pp. ii, 26), although the large extracted portion in his petition actually combines out of context language from *In re Murchison*, 349 U.S. 133 (1955) with *Withrow v. Larkin*, 421 U.S. 35 (1975) and includes within the quoted reference language which in fact is his own. That case demonstrates only the significant and substantive difference between this case and cases in which judicial conduct has in fact jeopardized due process of law. In the *Aetna Life* case, the district judge's direct personal financial stake in the outcome of the case constituted the perceived deprivation of due process. The facts of this case are not remotely analogous. Unlike *Aetna Life*, this case does not arise on direct review of a failure to recuse but is a collateral attack on a judgment and the facts of this case show there

was no "probability of actual bias", as both courts below have confirmed. *See, Withrow v. Larkin, supra,* 421 U.S. at 47 (1975).

Margoles rests heavily on the letter referenced above in which an assistant attorney general in 1975 said that assistant attorney general Tinglum and Journal Company counsel had had communication, now calling it his "principal exhibit." He criticizes the Court of Appeals for not mentioning it. (Petition, p. 17) The Court of Appeals was well aware of the letter—Margoles argued it in his briefs and in his Petition for Rehearing to that Court. Understandably, the Court considered it of no significance. The record already shows, and it was recognized in the opinion, that there had been some "communication." But as demonstrated by the record, it was innocuous communication. Yet Margoles is willing to leap from that innocuous communication to exaggerated charges.

His characterization of these communications as "spanning several years" (Petition, p. 27) exaggerates isolated events without basis. The three letters between Brody and Tinglum, which the Court found to be of no significance, were written in 1974. The only other "evidence" of this case having received attention by anyone in the Attorney General's office are two handwritten notes from the records of that office, one affixing a copy of a newspaper story on the commencement of this suit in 1972 (Ex. B-4) and noting the name of defense counsel, and the other containing notes of the damages asked, the appellate status of, and the names of the attorneys involved on both sides of the slander case initiated earlier against these same parties by Margoles in the District of Columbia. (Ex. B-3) *See,* note 2, *supra.*

The three telephone conversations noted above between James Wieghart and assistant attorney general LeRoy

Dalton in 1965 and 1968 all occurred before Judge Warren was Attorney General. None, at least as far as is known or is shown on the record, had anything at all to do with any matter subsequently involved in this lawsuit. (See, Exs. 14, B-8, B-9)

Even if Judge Warren had been personally aware of these matters, there would be no basis for arguing that he was prejudiced or judicially incapacitated by them. The Court below so found. (A-10 - 11) But Margoles goes even further and argues that his "evidence" proves that Judge Warren had an "of counsel" relationship with Respondents and a "substantial interest" in this matter in violation of 28 U.S.C. § 455. (Petition, pp. 12 n. 2, 28) This specious contention was rejected by both the district and the appellate court in resolving Margoles' first collateral attack. 660 F.2d at 299. The Court of Appeals in this case reiterated that Margoles' claim that Judge Warren was "of counsel" to Respondents' counsel was "groundless" and his claim that Judge Warren had a "substantial interest" in the case was "totally unfounded." (A-11)

To overcome the absence of evidence of judicial impropriety, Margoles has constructed a confusing pile of events taken out of context or chronology, and unreasonable, pyramided speculations, from which he draws suspicions of conspiracy and exaggerated, baseless conclusions.

Margoles complains that the Wisconsin Attorney General's office "barred" him from seeing certain files in 1979, citing two paragraphs (par. 18, 19) of his motion in this proceeding, which in turn reference exhibits cited in the previous appellate round in this case. It is noteworthy that in paragraph 18 Margoles acknowledges that the Court in the Western District case (Margoles' suit against the Board of Medical Examiners) supported the Attorney General's refusal to give access to certain files by deny-

ing Margoles' motion to produce. Margoles also complains that the Attorney General refused access to some of his files under the Open Records law in 1983. (Petition, p. 11) It should be pointed out that whatever action the Attorney General's office took with regard to those two matters has not been the action of these Respondents, or of Judge Warren, but of the Attorney General's office under Bronson LaFollette, successor to Attorney General Warren, and were not part of the instant case.

C. No Duty To Disclose Exists Or Was Breached

Margoles argues that there was a duty of disclosure here, which was breached, (Petition, pp. 20-25) and he urges engrafting onto the standards of judicial ethics the disclosure requirements for arbitrators. (Petition, p. 20) That suggestion is misplaced in this collateral attack. The Judicial Canons and 28 U.S.C. § 455 provide adequate safeguards. In any event, Margoles' proposal would be limited to the disclosure of "circumstances which reasonably could require disqualification of the judge." (Petition, p. 23 n. 7) It has been determined repeatedly in this case that such circumstances did not exist.

Obviously where there is nothing to disclose, there can be no duty to "disclose".

D. There Was No Reason For Judge Evans To Recuse Himself

Margoles asks, (although he does not state it to be the fact), whether he was denied his right to "an impartial judge" in 1984 because Judge Evans did not recuse himself. (Petition, pp. ii, 13-14)

The suggestion that Judge Evans should have recused himself has no support in fact and, as the Court of Ap-

peals said, is ". . . completely without merit. . . ." (A-5, n. 3) One point should be noted. Characteristically, Margoles suggests significance in the fact that one of Respondents' counsel, James P. Brody, was one of the attorneys for Judge Warren in *Steinle v. Warren*, 582 F.Supp. 1537 (1984), 765 F.2d 95 (7th Cir. 1985). (Petition, p. 14) (Judge Evans was not the judge in that case.) Mr. Brody was retained in that case in late 1983, more than seven years after Judge Warren had last sat in this case, and at a time when one could reasonably have concluded that this case was over, this Court having denied Margoles' petition for certiorari for the second time over one year earlier. The judgment for costs and fees awarded against plaintiff Steinle in that case was assigned by Judge Warren to the United States of America which had undertaken his representation. *See, Steinle v. Warren, et al.* and *United States of America v. Steinle,* defendant, and *All Title Services, Inc., et al.,* garnishee defendants (E.D. Wis., No. 83-C-1840).

III.

THERE IS NO FIRST AMENDMENT ISSUE IN THIS CASE—COSTS WERE PROPERLY ASSESSED

Margoles' claim that the imposition of costs against him for filing a frivolous appeal violates his First Amendment right to petition is without merit and is contrary to recent decisions of this Court. Characteristically, Margoles cites the concurring opinion of Justice Brennan in *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787 (1985), for a general principle of little direct bearing on this case (Petition, p. 19) but ignores both the holding of the Court in that case and an earlier decision of this Court which dispose unequivocally of his contention.

The holding in *McDonald* is that the First Amendment right to petition does not immunize libels expressed in the petition to any greater degree than the First Amendment protects any other expression. 105 S. Ct. at 2791. The recent and principal precedent for that holding was *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161 (1983), a case quoted and cited as controlling in *McDonald* but omitted by Margoles from his petition. The opinion of this Court in *Bill Johnson's* stated clearly that suits based on insubstantial claims are not within the scope of First Amendment protection:

> "Just as false statements are not immunized by the First Amendment right to freedom of speech (citations omitted), baseless litigation is not immunized by the First Amendment right to petition."

103 S. Ct. at 2170.

The imposition of damages and costs by the Court of Appeals in this case was proper and in accordance with Fed. R. App. P. 38. Margoles' appeal was frivolous, and an undue prolongation of already over-extended litigation.

Margoles has carried on a campaign in the courts for two decades since his criminal convictions and the refusal of the Wisconsin Board of Medical Examiners to relicense him. His approach has remained constant and is evidenced again in this case—he has been unwilling to accept the finality of judgments, and continues to litigate and perpetuate litigation, with repeated charges of denial of due process, to the harassment of those who have been involved as his adverse parties, their agents, and the courts.

In 1969, after the Wisconsin Board of Medical Examiners denied his relicensure, he appealed unsuccessfully to the Circuit Court of Wisconsin, and then to the Supreme Court of Wisconsin. *Margoles v. Wisconsin State*

Board of Medical Examiners, 47 Wis. 2d 499, 177 N.W.2d 353 (1970). He claimed, among other things, that he had been denied due process. The Wisconsin Supreme Court disagreed, ruling due process had been fully accorded. It said that competent testimony supported the finding of Dr. Margoles' "inability to accept his own guilt and his placing of blame on the sentencing judge and governmental agencies." 47 Wis. 2d at 514, 177 N.W.2d at 361 (1970).

Six days after that decision, Margoles filed civil suit against the Board, Board members, its private investigator, and its lawyer, charging them with conspiracy, defamation and denial of civil rights. That litigation was in the courts from 1970 to 1981. *Margoles v. Ross*, 67 F.R.D. 666 (W.D. Wis. 1975), and *Margoles v. Board of Medical Examiners*, 446 F.Supp. 959 (W.D. Wis.), *aff'd* and *rev.*, 588 F.2d 832 (7th Cir. 1978); *Margoles v. Tormey*, 643 F.2d 1292 (7th Cir.), *cert. denied*, 452 U.S. 939 (1981).

Likewise in this case, commenced in 1972, Margoles is unwilling to accept the finality of the judgment entered against him eleven years ago and seeks to blame others for the result. In 1980, after he had lost this case in 1976 before Judge Warren, had appealed unsuccessfully without any reference to Judge Warren's alleged partiality, had been denied a rehearing, and had been denied certiorari by this Court, he collaterally attacked the judgment on the ground that he had been denied due process, on "evidence" which largely had been in his possession when judgment was entered in 1976. He lost again, this time before a different trial judge, Judge Evans, and again continued unsuccessfully with an appeal and a certiorari petition to this Court. Three years later, in 1984, on the basis of the documents he already had lost on, plus a few added documents the Court of Appeals has called "patently innocuous," he moved once more, attacked the judge

who originally decided the case and defendants' counsel, and claimed that Judge Evans, who had ruled against him on the second 60(b) motion, should recuse himself. Notwithstanding Judge Evans' findings that Margoles' position on the facts was "incredible" and "insufficient" (A-18 - 19), Margoles appealed once more and even requested a rehearing from a Court of Appeals which had found his evidence to be "patently innocuous" and "totally inconclusive" (A-9) and his position to be "woefully inadequate," "groundless," and "totally unfounded." (A-11)

The Respondents have been put to a great deal of expense by Margoles over a 16 year period. After being taken to the Court of Appeals for the District of Columbia Circuit in the predecessor case in 1971-1972 on a jurisdictional issue, they have had the burden of going back to court and through the appellate process all the way to this Court three times in this case to defend a judgment they received in January, 1976.

There were ample grounds for the modest costs awarded by the Court of Appeals to the Respondents on this latest appeal. Indeed, there would be ample grounds for an award of double costs here. Supreme Court Rule 50.7. The Petitioner's repeated attempts to reopen this case (a slander case involving alleged telephone calls in 1970) abuse the judicial process.

If parties could vacate judgments as Petitioner seeks here, by making extravagant charges of denial of due process on the basis of suspicion, speculation and unwarranted inferences, our system of resolving disputes in the courts would suffer severely. As the district court said, there "must be finality somewhere in the system, and that point has now been passed." (A-19) Requiring Margoles to pay a small fraction of the expenses he has unreasonably caused the Respondents after that point was passed is reasonable and is in conformance with the federal appellate rules.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 6, 1987

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No. 86-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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OVERVIEW

Part of the answer to Respondents' argument to the Court--that this petition "raises no new, interesting, or controversial legal issues and presents no special or important reason" justifying review (R. Br., p. 9)--appears in, and Petitioner asks the Court to take judicial notice of, a recent article, "Chicago Courts Reel From Corruption Probe," in the *National Law Journal* (March 2, 1987).

The feature reported a "long, hard look at itself" being made by Chicago's legal profession in the wake of the state court judicial scandal known as Operation Greylord. Identified among the problems which are compromising the courts are *ex parte* communications between lawyers and judges, and the unwillingness of lawyers to come forward about wrongdoing, for fear of reprisals.

Greylord may be an extreme example of misconduct in the courts, but unfortunately it is not alone across the nation, and the article cites a realization that "it could have taken

place anywhere." The article emphasizes that the future integrity of the judicial system requires enforcing high ethical standards and confronting impropriety when it occurs--instead of looking the other way and remaining silent. These points, applied to this case, answer Respondents' arguments by presenting strong reasons why Certiorari should be granted.

First, it both defiles the very essence of the federal courts as a neutral and detached forum, and renders Petitioner's Due Process right to an impartial judge a sham, for Respondents' attorneys to have had an undisclosed, private, and ongoing line of communication about this pending lawsuit with Judge Warren/his assistant(s) as Wisconsin Attorney General prior to Warren's judicial appointment and assignment to this case. (The key exhibit, Pl. Exh. #B-1, documenting this extraordinary extrajudicial relationship, is discussed, *infra* at pp. 10-16) Under these circumstances, as a matter of law, Petitioner

did not come before Judge Warren on equal standing with Respondents[1], and "Equal Justice Under Law" has been supplanted here by an Orwellian concept that "all...are equal, but some...are more equal than others."

To allow this practice to be sanctioned, as the Seventh Circuit has done, is to send a dangerous message at the wrong time as to the level of ethical conduct that will be permitted in federal courts.

DENIAL OF PETITIONER'S FIRST AMENDMENT RIGHTS

Second, regarding the article's description of the reluctance of lawyers to come forward about judicial improprieties, sanctions such as the Seventh Circuit has imposed upon Petitioner, if permitted to stand, will have a chilling effect upon others encountering ethical improprieties.

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[1]as should be proscribed, Petitioner submits, by the Court's prohibited "possible temptation (petition, pp. 25-26), and is absolutely barred under the consultative "of counsel" prohibition of (pre-1974) 28 U.S.C. § 455 (petition, n. 9, pp. 28-29).

Had Petitioner engaged in "baseless litigation," Respondents' contention would be correct that he would not be subject to First Amendment protection. (R. Br., p. 20) But that is not what happened here. Petitioner was entitled to a review of the evidence, the issues, and of the applicable law he presented in good faith to that Court. This he did not receive. As detailed in the petition (pp. 16-19; *infra*, pp. 11-14), the Seventh Circuit instead omitted and changed the centralities of Petitioner's appeal so that it lost its significance, and then penalized Petitioner $2,500 for what *it* had transformed into a "frivolous" appeal. Instead of confronting the sensitive issues raised before it, alleging a colleague's impropriety, that Court penalized Petitioner for raising them.

This Court has held that "the government is prohibited from infringing upon...(the First Amendment guarantees of petition and free speech)...by imposing sanctions for the

expression of particular views it opposes." (*Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464 [1979]) Yet, a form of that, in essence, is what the Seventh Circuit has done and thereby raises a question to this Court with significant Constitutional and public policy implications:

Do the First Amendment rights "to petition the government for a redress of grievances" and free speech exclude protection of good faith criticism of federal judicial impropriety?

NEED FOR DISCLOSURE REQUIREMENT BY THE COURT

Third, an essential element of assuring ethical compliance is that of full disclosure, and Respondents' brief further demonstrates the need for the Court to extend to all federal court proceedings the requirement of "frankness at the outset" that it imposed regarding disqualification requirements for federal arbitrators. (*Commonwealth Coatings Corp. v.*

Continental Casualty Co., 393 U.S. 145 [1968])[2]

Respondents assert that Petitioner "is unwilling to accept the finality of the judgment entered against him eleven years ago." (R. Br., p. 21) But, what is telling is the absence of any claim on their part that they previously had disclosed or that Petitioner had any prior knowledge during those earlier proceedings of the newly discovered extrajudicial "maintaining communication" relationship. For Respondents' counsel--and Judge Warren--not to have made such disclosure when Petitioner had raised the issue of Judge Warren's disqualification during each of the previous two sets of proceedings, prejudiced those proceedings. Beyond this, for Respondents' attorney, James P. Brody, to have vigorously and successfully opposed both the

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[2]In arguing that adequate safeguards for disclosure already exist (R. Br., p. 18), Respondents neither mention nor respond to the problem of the series of "non-disclosure" cases detailed in the petition. (n. 6, pp. 20-21)

assignment of an outside judge to hear Petitioner's R. 60 (b) (6) motion and any hearing into the improprieties alleged, involving Judge Warren and Brody in this case--while Brody simultaneously was the lawyer of record defending Judge Warren against alleged wrongdoing, in another lawsuit pending in the same court--contravenes the appearance of high ethical standards in the federal courts and smacks of a "good 'ol boy" relationship at work. (petition, pp. 13-14) Brody asks the Court to accept such matters as "of no interest to any one other than the litigants." (R. Br., p. 9) But, to the contrary and that they taint the federal courts and the judicial process, see, e.g., "Margoles case confronts Seventh Circuit with 'actual improprieties.'" (Rob Warden, *Chicago Lawyer*, December, 1985)[3]

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[3]Respondents attempt to cloud the significance of these non-disclosures by misrepresenting the impact of several points of law upon this case, e.g.:

1) Wisconsin's New Open Records Law: They suggest that the preceding Open Records Law

similarly would have allowed Petitioner previous access to the newly produced documents. (R. Br., n. 6 at p. 7) In fact, Petitioner had made a number of such previous requests and had obtained a 1974 discovery order in the first slander case--which covered these matters--but for whatever reason, it was not until 1983 and under the new law that Atty. Gen. Warren's successor produced some of what the Warren administration previously had withheld. (e.g., par. 29, R. 60 [b][6] motion)

2) The One-Disqualification Motion Limit: Respondents would have the Court believe that Petitioner could have avoided the controversy over Judge Warren by having brought a *second* disqualification motion in this case, against him. None of the cases they cite (R. Br., n. 3 at pp. 3-4) permitted a party to file a second disqualification motion in the same case. To the contrary, every reported federal case on this issue has forbidden such attempts. (See authorities cited in n. 2 at pg. 11, Pl. R. Br. in the Seventh Circuit Court of Appeals. It also was the subject of Plaintiff's "Post-Oral Argument Supplemental Brief" to that Court, containing additional authority on the one-motion limit.)

3) Writ of Mandamus: Respondents use holdings from other circuits to say Petitioner had and did not exercise the right in 1975 to seek a writ of mandamus to disqualify Judge Warren. However, in 1975, the Seventh Circuit followed a "minority view" barring such writs, and changed that position two years later in a "case of first impression" under the newly amended 28 U.S.C. § 455 (which was not applicable to this case, n. 2 at A-4; *SCA Services, Inc. v. Morgan*, 557 F. 2d 110, 112, 117).

A result of these repeated non-disclosures--which cannot be emphasized too strongly in view of Respondents' claim that "as demonstrated by the record" (e.g., R. Br., p. 16) Petitioner's showing is inadequate--is that ***the record now before the Court is <u>not the totality</u> of the extrajudicial communications or of Judge Warren's role in them--it is <u>all</u> that Petitioner is permitted to see in the face of an assertion of lawyer-client privilege by the Attorney General's office and Respondents' successful blocking of the evidentiary hearings sought in Petitioner's 1980 R. 60 (b) (4) and present R. 60 (b) (6) motions so that full discovery could be made.*** Respondents misstate this situation to the Court, e.g.,

> "Most important, there is not a sliver of evidence that Judge Warren personally knew of any of these matters." (R. Br., p. 15)

It is not that such evidence does not exist, but that Petitioner is denied access to

the very files bearing on Judge Warren's knowledge. From this distinction arises the applicability to Judge Warren of the presumption of "shared knowledge" within his former office,[4] and further demonstration of the need for this Court to prohibit "gamesmanship" in lieu of full disclosure affecting judicial disqualification.

THE KEY EXHIBIT (PL. EXH. #B-1): "MAINTAINING COMMUNICATION"

NOTE: PETITIONER ASKS WHOEVER REVIEWS THIS CASE TO EXAMINE--IF NOTHING ELSE--WHAT FOLLOWS, BECAUSE THE EXTRAORDINARY SUBSTANCE AND CONTEXT OF PL. EXH. #B-1 MOST STRIKINGLY CONVEY THE MERITS OF THIS PETITION.

In contending to the Court that it should

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[4]Inclusion among Petitioner's exhibits of detailed documentation of Atty. Gen. Warren's repeated personal involvement and knowledge concerning the several other Margoles cases in his office, was for the purpose of establishing the applicability to Judge Warren in this case of the presumption of "shared knowledge." (petition, n. 4 at p. 13; n. 8 at p. 27) This also belies the blinders donned by the lower courts and the "Chinese Wall" Respondents' Attorney Brody has been attempting to construct around Judge Warren (e.g., R. Br., p. 15; cf: petition, n. 3 at p. 4)

not hear this case, Respondents draw several quotations from the Seventh Circuit's decision in which it stated that,

> "(I)t had 'thoroughly examined the documents underlying the plaintiff's motion' and...determined Petitioner's 'evidence' to be 'either totally inconclusive' or 'patently innocuous' (A-19) and 'woefully inadequate to warrant relief under Rule 60 (b) (6).' (A-11)" (R. Br., p. 9; also see p. 17)

The problem with these statements is that *nowhere* in the decision--throughout which that Court stated the reasons upon which it based these conclusions--did it mention Pl. Exh. #B-1 which lies at the heart of and gives the present R. 60 (b) (6) motion its significance.

Pl. Exh. #B-1 is an internal memorandum from the Wisconsin Attorney General's office. Dated March 3, 1975, it enumerated some of a staff attorney's activities over the previous four-and-a-half years (during the Warren administration) in assisting Attorney General Warren's defense against Petitioner's then-pending, first defamation (and Civil Rights) lawsuit (petition, pp. 3-4)--including:

"...MAINTAINING COMMUNICATION WITH ATTORNEYS FOR THE MILWAUKEE JOURNAL COMPANY, WHICH IS DEFENDING A SIMILAR SUIT BROUGHT BY DR. MARGOLES IN U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN."
(Pl. Exh. #B-1; emphasis added)

The two key words in this internal memo which create the extraordinary Constitutional and ethical issues now before this Court are **"MAINTAINING COMMUNICATION."**[5] The plain and unambiguous meaning of ***"maintaining"*** as "continuing" or "ongoing"--taken together with the application to Atty. Gen. Warren of the presumption of shared knowledge (*supra* at p. 10)--brought this extrajudicial relationship and Judge Warren within the absolute, consultative "of counsel" prohibition of the (pre-1974) 28 U.S.C. § 455 applicable to this case (petition, n. 9 at pp. 28-29, p. 12). As well, Petitioner submits, they come within a special category of conduct or relationships for which the Court, on a case-by-case basis,

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[5]Inadvertently, the gerund "maintaining" erroneously was typed as the verb "maintained" in the petition.

has required *per se* judicial recusal because of what it proscribes as the "possible temptation." (petition, pp. 25-26)

Neither the "possible temptation" prohibition nor the "shared knowledge" presumption appears anywhere in the Seventh Circuit's decision. The "of counsel" disqualification requirement was not analyzed--only mentioned as being dismissed as "groundless." (A-11)

So, too, does Respondents' brief avoid addressing the "consultative" aspect of the § 455 "of counsel" ban or the "shared knowledge" presumption. It brushes past the "possible temptation" rule with a misstatement of what the Court has held in those cases. (R. Br., p. 15; cf: petition, p. 26) Instead, it says that the Seventh Circuit did apply the bias in-fact standard. (R. Br., p. 11) This assertion lacks a citation to the decision, because the only--and a blanket statement in the opinion as to the applicable standard of proof here for

disqualification--was that Court's blatantly erroneous assertion, i.e.,

"The plaintiff maintains that the proper threshold of proof would be that of an appearance of partiality." (n. 11 at A-11; cf: petition, n. 5.b. at pp. 17-18)

Where the Seventh Circuit entirely avoided Pl. Exh. #B-1, Respondents attempt to excuse the extrajudicial "maintaining communication" as "innocuous." (R. Br., p. 14)[6] Such efforts are precluded by

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[6] **CONTEXT OF "MAINTAINING COMMUNICATION":** Respondents fail to include several relevant facts which provide the context for, and refute their attempted trivializing of the "maintaining communication," e.g., they would have the Court believe Petitioner's two slander cases (about which Atty. Gen. Warren's office and defense counsel were communicating) were very "different" cases involving "a wide range of different issues..." (R. Br., n. 5 at pp. 5-6) What they do not say is that a primary issue dominant in both cases was Petitioner's complaint that the defendants respectively had slandered him by accusing him of having committed what were then illegal abortions (See the respective complaints: Pl. Exh. #1 [this case, count I - par. 7.a. at p. 2; count II-par. 7 at p. 3; count III - par. 7.a. and b. at p. 4] and Pl. Exh. #2 [the first defamation case which Atty. Gen. Warren was defending: count I - par. #12 at pp. 5-6; count III - par. 22 and 23 at p. 10].) Indeed, the internal memo from the Attorney General's office speaks of this case being "a similar suit" to the one

it was defending. (Pl. Exh. #B-1)

Moreover, Respondents do not tell the Court that their answer in this case included an affirmative defense of truth. (answer, par. 34 at p. 5) Under these circumstances, it does not ring true for Respondents' attorneys to ask the Court to believe that the communications consisted only of several letters in February-March, 1974, in conjunction with Atty. Gen. Warren's office forwarding essentially part of the court record in the first defamation case. (R. Br., p. 14) Because "a counselor at law is enjoined to probe deeply for all the facts, favorable and unfavorable, before counseling a particular course for his client" (*Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380, 385, 8th Cir. [1979]), it defies credibility that Respondents' attorneys would have asked merely for the "public record" (R. Br., p. 14) in the first defamation case, and would not have taken the fullest possible advantage of the extensive files and persons in the Attorney General's office simultaneously defending state medical board officials against the ***same*** defamation issue brought by the ***same*** plaintiff. After all, Atty. Gen. Warren/his office were the source likely to have information Respondents' attorneys were seeking to prepare their defense in this case!

It is apparent on the face of the first letter (Pl. Exh. #B-5, dated February 4, 1974 in which public documents were mailed to Respondents' counsel) that this was in response to *prior* communication between the two offices. This is consistent with the unrebutted statement of the staff attorney subsequently defending the first defamation case, to Petitioner's counsel, that the Attorney General's office and Respondents' attorneys, in fact, were exchanging information and cooperating with each other in the two slander

transcending Constitutional and ethical concerns which require *per se* disqualification because of the conduct or relationship itself--without the need to show actual prejudice on the part of the judge. As expressed in another of the Seventh Circuit "non-disclosure" cases:

"The vice of *ex parte* communications is well illustrated by this case. It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declarations. This is why the prohibition is not against 'prejudicial' *ex parte* communications, but against *ex parte* communications." (*In Re Wisconsin Steel Corp.*, 48 B.R. 753, 760, N.D.Ill.E.D. [1985]; also, *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446, 6th Cir. [1980]; see petition, n. 6 at p. 21)

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cases. (R. 60 [b] [6] motion, par. 26 at p. 14, as sworn to by the accompanying affidavit of Petitioner's counsel, dated January 3, 1984)

Indeed, the crux of Pl. Exh. #B-1 was that Atty. Gen. Warren's assistant was "maintaining communication" with Respondents' attorneys to gain information for the defense of the first defamation case. But, that office has asserted lawyer-client privilege against Petitioner seeing any such communications from its "trial file." (petition, pp. 11-12)

STANDARDS OF REVIEW

Respondents cite as the standard of review for a R. 60 (b) (6) motion, that "no reasonable person could agree with the district court's decision." (R. Br., p. 12) Applying that criterion here, no reasonable person would accept as a matter of fundamental Due Process a judge presiding over a case where the judge/his assistants previously had been "maintaining communication" about the case with a party's opponent. And no reasonable person would find tolerable the repeated failures to disclose this extrajudicial relationship.

An equally applicable and perhaps more appropriate standard for review here is that enunciated by the Fifth Circuit:

> "This court, moreover, through the exercise of our supervisory powers, can prohibit any practice which threatens the judicial process and its integrity. (*U.S. v. Columbia Broadcasting System, Inc.*. 497 F.2d 107, 109-110, 5th Cir. [1974])...An appellate court always has the inherent power to promote Justice by holding improper a trial judge's failure to disqualify himself. (*Texaco, Inc.*,

v. Chandler, 354 F.2d 665, 10th Cir. [1965])"

(*Fredonia Broadcasting Corporation, Inc. v. RCA Corporation*, 569 F.2d 251, 256-257, 5th Cir. [1978])

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